

**THE INVENTION OF "HEBREW LAW"
IN MANDATORY PALESTINE**

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1. PAST IMPERFECT

This is a study of the relationship between nationalist ideology and law in one specific historical context. It examines the attempt of Jewish nationalists to create a Jewish legal system in early 20th century Palestine. Like many nationalist movements, Zionism, the Jewish nationalist movement, sought to "revive" its cultural past. The best known aspect of Zionist cultural activity was the "revival" of the Hebrew language, but linguistic "revival" was not the only item on the cultural agenda. Some Zionists also sought to "revive" what they called *Mishpat Ivri*—"Hebrew law"¹ and make it the legal system of the Jewish community in Palestine. What was the nature of this legal "revival"? According to the leading contemporary scholar of *Mishpat Ivri*, Menachem Elon, the revivers of Hebrew law during the British Mandate wanted to "restore"² the Jewish legal past. The movement for legal revival, according to Elon's historical narrative, sought to reconnect the legal system of the future Jewish state in Palestine with the legal culture of the Jewish Exile, moribund since the rise of the Enlightenment in the eighteenth century. Elon therefore posits a more or less smooth link between the legal system of the Jews in Ex-

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1. The term *Mishpat Ivri* has conventionally been translated as "Jewish law," see e.g., Menachem Elon, *Jewish Law: History, Source, Principles: Ha-Mishpat ha-Ivri*. (Bernard Auerbach & Melvin J. Sykes, trans., 1994), but as I argue below, this translation is misleading, because it implies a false continuity between the Jewish legal past and the legal system that the revivers wanted to create in Palestine.

2. Id. at 1588.

ile—the *Halakhah*, and the legal system that the revivers wanted to create in Palestine.³

In this article, I will argue for another reading of the early (pre-mandatory and mandatory) history of the movement for the revival of Hebrew law. The “revival” of Hebrew law, like the “revival” of a large part of Hebrew culture was not meant to be a continuation of the Jewish past, but a break with it; not so much the “restoration” of an old tradition, as the invention of a new one.⁴ Secular Zionists sought to create a new “Hebrew” person who would be the anti-thesis of the old Exilic Jew.⁵ Secular Zionist ideology despised the culture of the Jewish Exile, and wanted to replace this culture with an invented, secular, “Hebrew” culture.⁶ Hebrew law, like the rest of Zionist culture, was constructed by its early advocates, most of whom were secular Jews, as a reflection of Zionist ideology and identity needs. It was to be a new legal system, not the “restored” old system of the Jews of the Diaspora.

The story of the movement for the revival of Hebrew law is now almost totally forgotten,⁷ I will therefore begin with a brief intellec-

tual and institutional description of the movement. I will then argue that some early “revivers” of Hebrew law defined it in a way which did not link it to the Jewish legal past at all, and that even those revivers who were supposedly more committed to the use of elements of traditional Jewish law in the future legal system of Palestine, wanted to create a legal entity that had little to do with the Jewish legal past. Finally, I will examine how the need to “sell” Hebrew law to the Zionist community in Palestine also forced the revivers to erase and suppress much of the Jewish legal past in order to make their proposed legal system fit the dominant trends in Zionist ideology at the time. Hebrew law, I will conclude, was a piece of legal fabrication—a new legal entity defined and assembled by its “revivers” in a way which would entice its potential subjects—the Jewish community in Palestine—to adopt it.

Throughout this article, I will use the term “Hebrew law” to designate the legal system that the revivers wanted to create in Palestine and the terms “Jewish law” or “traditional law” when I refer to the historic legal system of the Jews, the *Halakhah*.

2. THE MOVEMENT FOR LEGAL REVIVAL

Hebrew law was born out of an affair between German professors and Zionist students. Its progenitor was Friedrich Karl von Savigny, a German professor of law, who was the main spokesman of the early nineteenth century German Historical School and the expounder of its nationalist theory of law. According to Savigny, law was a popular creation that could not be created “from above” by the rational mind of an enlightened ruler. Instead, it was created by the people “from below” in an organic, silent, unconscious process. Since law was a creation of the people, it could not be universal. Each nation had its own laws, just as each nation had its own language, and both law and language were reflections of the unique spirit of the nation, its *Volksggeist*.⁸ As the nineteenth century progressed, the ideas of the Historical School were attacked from various quarters, but they were never completely abandoned. Indeed, by the end of the century they gained

Re-Inventing the Jewish Past: European Jewish Intellectuals and the Zionist Return to History 87-89 (1995). The history of the Hebrew Courts of Arbitration is discussed in Ronen Shamir, “Mishpat u-Le’umiyut be-Yisra’el, 1919-1929,” (Law and Nationalism in Palestine, 1919-1929) (unpublished discussion paper, 1997); Yitshak Gil-Har, “Hitargenut ve-Hanhagah Atsmat shel ha-Yishuv be-Erets Yisra’el be-Reshit ha-Shilton ha-Briti ad le-Ishur ha-Mandat (1917-1922),” (The Organization and Self-Government of the Yishuv in Palestine from the Beginning of British Rule to the Ratification of the Mandate) Ph.D. dissertation, Hebrew University, 1973, at 200-22.

8. See Friedrich Karl von Savigny, *Of the Vocation of our Age for Legislation and Jurisprudence* 24 (Abraham Hayward, trans. 1834). See also “Symposium: Savigny in Modern Comparative Perspective,” 37 *Am. J. Comp. L.* 1 (1989); James O. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (1990).

3. Such a smooth link is, indeed, the unavoidable result of Elon’s definition of *Mishpat Ivri* as a sub-group of the norms of the *Halakhah* (those norms of the *Halakhah* that deal with the subjects that modern legal systems are supposed to regulate i.e., criminal, contract, tort or administrative law). See *id.* at 110.

4. The term is taken from *The Invention of Tradition* (Eric Hobsbawm & Terence Ranger eds., 1983). See also Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (revised ed. 1991). The use of tradition to legitimize a new legal system is not something unique to Zionism. It was done, for example, when African customary law was invented: It is now generally accepted that African customary law was not a reflection of the law of pre-colonial African societies, but a legal system invented by African chiefs in the colonial era in order to retain and increase their power in the social and economic upheaval brought about by European expansion. See Ranger, “The Invention of Tradition in Colonial Africa,” in *The Invention of Tradition* 211, at 247-52 (Eric Hobsbawm & Terence Ranger eds., 1992); Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* 4 (1985); Sally Falk Moore, *Social Facts and Fabrications: “Customary” Law on Kilimanjaro, 1880-1980*, xv (1986); Roberts & Mann, “Law in Colonial Africa,” in *Law in Colonial Africa* 3, 4, 9 (Richard Roberts & Kristin Mann eds., 1991); Merry, “Review Essay: Law and Colonialism,” 25 *Law and Society Review* 889, at 897 (1991).

5. See e.g., Even-Zohar, “Ha-Tsmihah vaha-Hitgabshut shel Tarbut Ivrit Mekomit ve-Yelidit be-Erets Yisrael, 1882-1948,” (The Emergence and Crystallization of Local and Native Hebrew Culture in Eretz Yisra’el 1882-1948) 16 *Cathedra: For the History of Eretz Israel and its Yishuv* 165, at 171-75 (1980); Piterberg, “Ha-Umah u-Mesaprehah: Historyografiyah Leumit ve-Orientalizm,” (The Nation and its Raconteurs: Orientalism and Nationalist Historiography) 6 *Te’oryah u-Vikoret* 81, at 95 (1995); Yael Zerubavel, *Recovered Roots: Collective Memory and the Making of Israeli National Tradition* 18-19 (1994); Silberstein, “Others Within and Others Without: Re-thinking Jewish Identity and Culture,” in *The Other in Jewish Thought and History: Constructions of Jewish Culture and Identity* 1 (Laurence J. Silberstein & Robert L. Cohn eds., 1994).

6. The invented nature of much of modern Hebrew culture is discussed in Even-Zohar, *supra* n. 5, at 171; Zerubavel, *supra* n. 5, at 26.

7. In addition to Elon’s brief discussion of the movement in Elon, *supra* n. 1, at 1588-96, the thought of two Hebrew law revivers associated with the Hebrew University—Asher Gulak and Simcha Assaf—has also been studied. See David N. Myers,

new vigor as they became fused with evolutionary cultural theory, for example, in the work of the great German legal comparativist and ethnologist, Josef Kohler. Kohler was an assiduous scholar of non-western legal systems, and one of the leading German students of Jewish law.⁹ Unlike previous generations of German scholars, Kohler studied this law from a legal, rather than a theological perspective, using the new tools of German legal science in order to compare Jewish law to other legal systems.

German professors were interested in Jewish law, but only for comparative reasons. The idea that Jewish law should not only be studied but also revived, as part of the national "rebirth" of the Jewish nation, had its sources in Zionist ideology. It is true that western Zionists like Theodor Herzl had little interest in cultural, and consequently in legal, revival,¹⁰ but such a revival found ardent advocates among Russian Zionists, devoted to a cultural rather than a political version of Jewish nationalism.¹¹ In the beginning of the twentieth century, a number of Russian Jewish students, who had been educated in central European and Russian universities, decided that the time had come to begin the work of legal revival. One of their leaders was a young Swiss-educated Russian scholar, Samuel Eisenstadt. In 1916, Eisenstadt called for the establishment of a "scientific society for the study of Hebrew law." Such a society, the Hebrew Law Society (*Hevrat ha-Mishpat ha-Ivri*) was ultimately established in Moscow in 1918,¹² and the members of the society began publishing a scholarly journal in which they advocated legal revival. But the turmoil of the Russian Revolution and its aftermath hindered their activities. In 1920, as conditions in the Soviet Union worsened, the society was disbanded and some of its members immigrated to Palestine.¹³ Mean-

9. Kohler's contribution to the study of non-Western legal systems is discussed in Schott, "Main Trends in German Ethnological Jurisprudence and Legal Ethnology," 20 *Journal of Legal Pluralism* 37, at 41-44 (1982). Kohler's interest in Jewish law is discussed in Samuel Eisenstadt, *Ein Mishpat: Sefer Shimush Bibliyografi le-Sifrut ha-Mishpat ha-Ivri* (The Fountain of the Law: A Bibliography of Hebrew Law Literature) xix-xxvi (1931); Elon, *supra* n. 1, at 81.

10. Herzl did not think that the future Jewish state would use Jewish law. Instead he believed that it would adopt "modern," i.e., western, laws. See Theodor Herzl, *The Jewish State* 12 (Harry Zohn trans., 1970).

11. See generally, Walter Laqueur, *A History of Zionism* 96, 113, 162-66 (1989); Ehud Luz, *Parallels Meet: Religion and Nationalism in the Early Zionist Movement (1882-1904)*, 138-39 (Lenn J. Schramm trans., 1988).

12. See Eisenstadt, "Hevrah Mada'it le-Hakirat ha-Mishpat ha-Ivri: Mikhtav Galuy," (A Scientific Society for Research of Hebrew Law: An Open Letter), in Samuel Eisenstadt, *Tsiyon be-Mishpat* (Zion by Law) 31, at 33 (1967); S. H., "Le-Toldot Hevrat 'Ha-Mishpat ha-Ivri,'" (On the History of the Hebrew Law Society) 2 *Ha-Mishpat* 220 (1927).

13. "Le-Toldot," *supra* n. 12, at 221; "Takanot ha-Hevrah 'ha-Mishpat ha-Ivri' be-Erets Yisra'el," (Regulations of the "Hebrew Law Society" in Palestine), 1 *Ha-Mishpat* 196 (1927); "Ve'idat Hevrat 'ha-Mishpat ha-Ivri' bi-Yerushalayim, Sukkot Tarpav," (The Hebrew Law Society Conference in Jerusalem, Succoth 1925) 2 *Ha-Mishpat Ha-Ivri* 232 (1926/7); Samuel Eisenstadt, "Ha-Universitah shel Tel Aviv: Bet ha-Sefer ha-

while in Ottoman Palestine, a system of secular Jewish courts was created by Zionist immigrants. These courts, called the Hebrew Courts of Arbitration (*Mishpat ha-Shalom ha-Ivri*), were established in Jaffa in 1909. The main reason for their establishment was the practical desire of Zionist Jews not to be subjected to the jurisdiction of Ottoman, Consular or Rabbinical courts. However, the notion of nationalist legal revival may have also played a part in their creation.¹⁴

The collapse of the Ottoman Empire after the First World War and the subsequent formation of a British government in Palestine led to an increase in the activity of the Hebrew Courts of Arbitration.¹⁵ It was also at this time that their activity became fused with the activity of the Hebrew Law Society, newly reestablished in Palestine.¹⁶ Prominent Jewish lawyers in Palestine, like Norman Bentwich, the Anglo-Jewish Attorney General of Palestine, Gad Frumkin, the Jewish judge on the Supreme Court of Palestine, and Mordechai Eliash, a leading local lawyer, joined the Hebrew Law Society.¹⁷ An English branch of the society was formed in London in 1925.¹⁸

During the 1920s and early 1930s, the revivers published two scholarly journals, *Ha-Mishpat* and *Ha-Mishpat Ha-Ivri*,¹⁹ and founded two legal presses.²⁰ The journals and the presses, which were heavily influenced by German historical and sociological perspective of law, vehemently advocated legal revival. Using them, the revivers began consolidating their movement, creating a tradition

Gavohah le-Mishpat vele-Kalkalah," (Tel Aviv University: The School of Law and Economics) (undated manuscript), Central Zionist Archives, Jerusalem (hereinafter CZA), A212/37, at 4.

14. See Paltiel Daykan (Dickstein), *Toldot Mishpat ha-Shalom ha-Ivri: Megamotav, Pe'ulotav ve-Hesegav* (A History of the Hebrew Courts of Arbitration) 23-25, 68-69 (1964); Eisenstadt, "Mishpat ha-Shalom ha-Ivri be-Erets Yisra'el," (The Hebrew Courts of Arbitration in Palestine), in *Tsiyon*, *supra* n. 12, at 64; Gabriel Strassman, *Ote ha-Glimah* (Wearing the Robes: A History of the Legal Profession until 1962) 39-46 (1984).

15. By the middle 1920s they were averaging 1,600 cases a year. Daykan, *supra* n. 14, at 32-33. Many of the files of these Courts were preserved and are now to be found in the Israel State Archives, Jerusalem (hereinafter ISA), Record Group 76.

16. Some members of the Society, like Paltiel Dickstein and Shmuel Pen became involved in the administration of the Hebrew courts. See Daykan, *supra* n. 14, at 31; "Obituary: Shmuel Aba ben Shimshon Pen," 1 *Ha-Mishpat ha-Ivri* 173 (1925/6).

17. "Takanot," *supra* n. 13, at 196. Frumkin also mentioned another, independent, attempt, in 1918, to establish a society for Hebrew legal revival in Palestine. See Gad Frumkin, *Derekh Shofet bi-Yerushalayim* (The Life of a Jerusalem Judge) 231-32 (1956).

18. See "First Annual Report 1926-27," in *Transactions of the Society for Jewish Jurisprudence (English Branch)* (Herbert Bentwich ed., 1929).

19. *Ha-Mishpat* was supposed to be more practically oriented and *Ha-Mishpat ha-Ivri* more scholarly. See Dickstein, "Review: Ha-Mishpat," 2 *Ha-Mishpat ha-Ivri* 208 (1927). In practice they were quite similar.

20. Eisenstadt, "Ha-Universitah," *supra* n. 13, at 5; K. F., "Review: The Legal Library of Dr. Yehudah Junovits," 1 *Ha-Mishpat ha-Ivri* 159 (1925/6).

and a unified agenda for it. They attempted to establish a canonical list of works on Jewish law, by compiling a massive bibliography which was finally published in 1931. In this bibliography, works that had previously been classified as belonging to other fields, such as "general law, theology, archeology, history, Semitic linguistics, scriptural and *Talmudic* studies" were now reclassified as works belonging to "Hebrew law scholarship."²¹ Other works, which had previously been considered as part of the field, were excluded.²² They also decided to produce a Hebrew translation of the basic text of Roman law, the *Corpus Juris Civilis*. Part of this task was accomplished in 1939, when Eisenstadt published a Hebrew translation of the *Institutiones*.²³

In addition, the revivers tried to create a shared tradition for the movement. One way in which this was done was by obituaries to scholars whom they thought ought to be associated with it: Jewish lawyers as well as Gentile scholars.²⁴ Sometimes these obituaries, consciously or unconsciously, even invented a heroic history for the movement. For example, one obituary declared that although the "science of Hebrew law is young" it already has a "martyrology," that is, a "list of activists and scholars" who "died while standing in the guard of honor [of Hebrew law]." Another obituary referred to "the list of casualties of our young movement."²⁵ The revivers established a historical calendar of events connected with Hebrew law.²⁶ They also attempted to outline a unified, collective research plan which would lead by stages to legal revival.²⁷ Finally, they proposed measures which would broaden their circle of supporters. For example, one

21. Eisenstadt, *Ein Mishpat*, supra n. 9, at xiii. See also Webber, "A Bibliography of Recent Works on Jewish Jurisprudence," 68 *The Law Journal* 67 (July 1929) reprinted in *Transactions of the Society for Jewish Jurisprudence (English Branch)* supra n. 18; Levinthal, "Survey of Recent Works on Jewish Jurisprudence," 18 *Jewish Quarterly Review* 59 (1927).

22. For example, works dealing with "external Jewish law" i.e., Gentile laws relating to Jews. See Eisenstadt, *Ein Mishpat*, supra n. 9, at xiii-xiv.

23. Samuel Eisenstadt, *Ha-Institutsyot* (Institutiones) (1938/9).

24. See e.g. "Obituary: Josef Kohler," 1 *Ha-Mishpat ha-Ivri* 172 (1925/6).

25. "Obituary," supra n. 16, at 173; Dickstein, "Obituary: Moshe Ben Sha'ul Mazor," 3 *Ha-Mishpat Ha-Ivri* 187 (1928).

26. In 1930, for example, they marked "nineteen hundred years since the Exile of the Great Sanhedrin." See Eisenstadt, "Yovel la-Mishpat ha-Ivri," (A Hebrew Law Jubilee) 4 *Ha-Mishpat* 41 (1930). The same date was later marked by a special panel in the "World Conference of Hebrew law" which was convened in Tel Aviv in 1934. See "Hazmanah," (Invitation) (undated), CZA, A212/2.

27. See e.g., Dickstein, "Sha'are ha-Mishpat ha-Ivri," (Gates of Hebrew Law) *Ha-Mishpat ha-Ivri: Riv'on Mada'i* 122 (1918); "Ve'idat," supra n. 13, at 235; Gulak, "Tokhnit le-Avodat ha-Hevrah 'ha-Mishpat ha-Ivri,'" (A Plan for the Work of the Hebrew Law Society) 2 *Ha-Mishpat ha-Ivri* 195 (1926/7); Gulak, "Le-Sidur Hayenu ha-Mishpatiyim ba-Arets," (On Organizing our Legal Life in Palestine) 33-34 *Ha-Toren* (1930/1) reprinted in *Ha-Mishpat ha-Ivri u-Medinat Yisra'el: Leket Ma'amarim* (Jewish Law and the State of Israel: Collection of Articles) 28 (Jacob Bazak ed., 1969); Freimann, "Dine Yisra'el be-Erets Yisra'el," (Jewish Law in Palestine) *Luah ha-Arets* (1945/6), reprinted in Bazak, id. at 36.

of the revivers suggested that law should be taught in Jewish high schools in Palestine, so that Jewish students would become convinced of the desirability of legal revival.²⁸

In the 1920s, the project of creating an autonomous nationalist legal system for the Jews in Palestine seemed feasible. By the 1930s, however the movement for legal revival lost much of its momentum.²⁹ The Hebrew Courts gradually stopped functioning.³⁰ The journals published by the revivers slowly died.³¹ The focus of revival activity now shifted to legal education.³²

The only institution providing legal education in 1920s Palestine was the government-run Jerusalem "Law Classes." It was established by the British in 1920 as a practically oriented law school, where Jews and Arabs were trained to become Palestinian lawyers and law clerks. The Law Classes offered its Jewish students an elective course called "Rabbinical law," which focused on Jewish family law.³³ This could hardly have satisfied the aspirations of the revivers.

As early as 1918 the revivers considered creating a Hebrew law school in Palestine, and had expected the newly established Hebrew

28. Nehorai, "Limud ha-Mishpat be-Vet ha-Sefer ha-Beynoni," (Teaching Law in Secondary Schools), 1 *Ha-Mishpat* 167 (1927). See also Nehorai, "Al ha-Munahim ha-Mishpatiyim bi-Sfatenu," (On Hebrew Legal Terms) 2 *Ha-Mishpat* 217 (1927); Nehorai, "Ahre ha-Ve'idah," (After the Conference) 3 *Ha-Mishpat* 87, at 90 (1928) (suggesting that traditional legal terminology would be used when translating modern legal terms to Hebrew).

29. Eisenstadt, *Ein Mishpat*, supra n. 9, at xxvi.

30. The courts were considered voluntary arbitration tribunals by the British. In the beginning of the 1920s Jewish nationalist sentiment was still strong enough to lead to a voluntary submission to their jurisdiction, but this willingness gradually disappeared. By the late 1920s even nationalist bodies like the Tel Aviv municipality and the Zionist Executive refused to litigate in the Hebrew courts or else demanded that the courts adhere to Ottoman and English law instead of to the fuzzy notion of Hebrew law. The need to use the courts also weakened. A number of competing Jewish tribunals appeared. Government courts became more amenable to Jewish needs as the number of Jewish judges and clerks employed by these courts grew. Jewish lawyers versed in Ottoman and English law preferred Government courts, and sometimes argued that instead of supporting the Hebrew Courts, Zionist efforts should be directed to enhancing Jewish presence in government courts. See Bentwich, "The Application of Jewish Law in Palestine," 9 *Journal of Comparative Legislation*, (3d ser.) 59 (1927); Daykan, supra n. 14, at 36, 62-63.

31. *Ha-Mishpat* stopped regular publication in 1929, and was irregularly published in 1931 and 1934-5. *Ha-Mishpat Ha-Ivri* was published between 1925/6 and 1927/8, in 1932/3 and finally in 1936/7.

32. A brief summary of the history of legal education in Palestine during the mandate is found in Grunis, "Legal Education in Israel: The Experience of Tel Aviv Law School," 27 *J. of Leg. Education*, 202, 204-5 (1975). See also "Kenes Yovel ha-50 le-Beyt ha-Sefer le-Mishpat be-Tel Aviv," (50th Anniversary of the First School in Tel Aviv) 11 *Iyune Mishpat* 5 (1985/6).

33. Jewish family law was applied by the Rabbinical courts of Palestine, which had exclusive jurisdiction over family affairs of Palestinian Jews. See Kantorowicz, "Ha-Shi'urim le-Mishpat," (The Law Classes) 1 *Ha-Mishpat Ha-Ivri* 145 (1925/6); Eisenstadt, "Al Hora'at ha-Mishpat ha-Ivri be-Vet ha-Sefer le-Mishpat shel Memshalet Erets Yisra'el," (Teaching Hebrew law in the Law Classes of the Government of Palestine) 2 *Ha-Mishpat* 209 (1927).

University (founded in 1925) to implement the plan. When they realized that it would not do so, they criticized it harshly.³⁴ During the 1920s and early 1930s, the revivers put forward a number of plans for a law school, none of which materialized.³⁵ But as the need to provide for Jewish students and professors fleeing eastern European anti-Semitism and central European fascism grew,³⁶ these plans were finally accomplished.

In 1934, the first *Maccabiyah*, a Jewish version of the Olympic games, was held in Palestine. The revivers used the occasion to convene a "World Conference of Hebrew law." Following the conference, the "School of Law and Economics" was established in Tel Aviv. Its founders included Samuel Eisenstadt and Paltiel Dickstein of the Hebrew Law Society, as well as two Latvian immigrants, Max Laserson, a philosopher of law, and Benjamin Siew, an economist.³⁷ One of the major goals of this school, declared its founders, was to "to train jurists, lawyers and judges, who could fulfill the ideals of the nation in the field of legal revival." Unlike the government run Law Classes, the Tel Aviv school was to promote "Hebrew science" or "Hebrew knowledge." Even its economics courses were to be "imbued with a special Hebrew idea, [and] clothed in appropriate national attire."³⁸ In view of these nationalist goals, it is not surprising that the School did not receive any support or recognition from the British authorities in Palestine. Its graduates could not take the Palestine bar exams, and had to complete their studies abroad before being admitted

34. "Le-Toldot," supra n. 12, at 220; Dickstein, "Review: Y. Pokrowski, Toldot ha-Mishpat ha-Romi," 2 *Ha-Mishpat ha-Ivri* 207 (1927); Dickstein, "Review: Ha-Mishpat," 3 *Ha-Mishpat ha-Ivri* 165, at 166 (1927); Dickstein, "Review: Norman Bentwich, Yerushalayim—Ir ha-Shalom," 4 *Ha-Mishpat ha-Ivri* 175 (1932/3); Eisenstadt, "Al Hora'at," supra n. 33, at 211 (1927); Nehorai, "Al ha-Munahim," supra n. 28, at 217. In the early 1920s, Norman Bentwich drafted a detailed proposal for establishing a faculty of law at the Hebrew University. See Bentwich, "Proposal for a Legal Faculty at the Jerusalem University" (undated), *CZA*, A255/826; Frumkin, supra n. 17, at 231. Although this faculty was not established, Jewish law was studied at the Hebrew University as part of the program of Jewish studies. See Daykan, supra n. 14, at 73; Eisenstadt, "Ha-Universitah," supra n. 13, at 4.

35. See e.g. Elon, supra n. 1, at 86, n. 44; Eisenstadt, "Bi-Sha'are ha-Mishpat," (*The Gates of Law*) 4 *Ha-Mishpat* 1 (1930); Eisenstadt, *Ein Mishpat*, supra n. 9, at xxv.

36. See Meyer Dizengoff, "Palestine—A Center for Higher Education," in *School of Law and Economics: Tel Aviv* [July 1936], *CZA*, A212/2 at 3.

37. See "The Founders—Their Biographies and Works," in *School of Law and Economics; Bet ha-Sefer ha-Gavohah le-Mishpat ve-Kalkalah*, (*The School of Law and Economics*) [1935], *CZA* A212/2; Eisenstadt, "Le-Toldot ha-Haskalah ha-Mishpatit ha-Gvohah be-Erets Yisra'el," (*On the History of Higher Legal Education in Palestine*) in *Tsiyon*, supra n. 12, at 224, at 225; Eisenstadt, "Ha-Universitah," supra n. 13, at 11.

38. Eisenstadt, "Ha-Universitah," supra n. 13, at 11; *School of Law and Economics*, supra n. 36; B. Ziv "Ma Anu Rotsim," (*What do we want*) in *Bet ha-Sefer ha-Gavohah le-Mishpat ve-Kalkalah*, (*The School of Law and Economics*) [1935], *CZA*, A212/2.

to the Palestine bar.³⁹ The school also received little support from official Zionist bodies or the Hebrew University. Indeed, throughout its history, Jewish and later Israeli government officials, lawyers and professors, questioned its academic credentials and refused to see its graduates as equal to the graduates of the less academically oriented Jerusalem Law Classes.⁴⁰

Despite these obstacles the school slowly expanded, eventually becoming the core of what is today Tel Aviv University. But the school was unsuccessful in one respect. It did not fulfill its declared goal of serving as "an academic tool for the revival of Hebrew law." In 1937, the school established a committee for the "codification of Hebrew law," but this committee achieved nothing. Some professors at the school attempted to utilize Jewish legal sources in their courses, but generally speaking, this attempt was far from successful.⁴¹

The failure of the Tel Aviv school to further the cause of revival was just a symptom of the general decline of the movement. If the impetus of legal revival had weakened in the 1930s, by the 1940s the movement was practically dead. There was a brief reawakening of interest in Hebrew law between 1945 and 1948, as the prospects of an independent Jewish state neared, but this interest soon disappeared after Israeli independence in 1948. The secular majority in the new State of Israel, having satisfied its nationalist impulse by having Israeli judges and Israeli courts, totally abandoned the idea of creating a unique Hebrew legal system. As Haim Cohn, the Israeli attorney general declared—"Hebrew legal revival is not longer an issue. It was a concern of yesterday."⁴² The old leaders of the movement, like Eisenstadt (who by the 1940s had become a staunch supporter of Stalinism), continued to call for the creation of a "Hebrew" legal system, but the slogan of legal revival gradually came to be monopolized by religiously observant Jewish legal scholars. These scholars defined

39. Eisenstadt, "Ha-Universitah," supra n. 13, at 12, 16-17, 72, 102.

40. The only official body that supported the school was the middle-class dominated Tel Aviv municipality. See generally *Bet ha-Sefer ha-Gavohah le-Mishpat ve-Kalkalah, Sefer ha-Shanah, 1948* (*The School of Law and Economics: 1948 Yearbook*), *CZA*, A212/2, at 5; Eisenstadt, "Medinah u-Mishpat," (*State and Law*) in *Tsiyon*, supra n. 12, at 177, 182-83; Central Committee [of the Israeli Bar] to Minister of Justice, 14 August 1948, *CZA*, A212/32; Katzenelson "Ma'amado shel Bet ha-Sefer ha-Gavohah be-Tel Aviv," (*The Status of the Tel Aviv School of Law and Economics*) *Ha-Dor*, 18 April 1945; Strassman, supra n. 14, at 74-82.

41. See *Bet ha-Sefer ha-Gavohah le-Mishpat ve-Kalkalah: Sidre Limudim, 1944*. (*School of Law and Economics: Catalogue 1944*), *CZA*, A212/2, 3; Eisenstadt, "Ha-Universitah," supra n. 13, at 86; *Bet ha-Sefer ha-Gavohah le-Mishpat ve-Kalkalah be-Tel Aviv, Prospekt Li-Shnat ha-Limudim Tartsah* (*School of Law and Economics: Catalogue 1937/8*), *CZA*, A212/2, 5-6, 8, 11, 12; *Bet ha-Sefer*, supra n. 40, at 21; Menachem Elon, interview by author, New York, 21 November 1995.

42. See Cohn, "De'agah le-Yom ha-Mahar," (*Concern for Tomorrow*) in Haim H. Cohn, *Mivhar Ktavim* (*Selected Essays*) 15, at 18 (Aharon Barak & Ruth Gabizon eds., 1991); Elon, supra n. 1, at 1612-18; Cohn, "De'agah shel Yom Etmol," (*A Concern of Yesterday*) in Cohn, id. at 30-32, 38.

Hebrew law in a way that tied it more closely to the religious traditions of the Exile than many of the original secular Zionist revivers of Hebrew law had ever intended.⁴³

3. DEFINING HEBREW LAW

The term *Mishpat Ivri* (literally: Hebrew law) is a late-nineteenth century invention. According to Menachem Elon, since its invention, the term was used to denote those parts of the *Halakhah*, Jewish law, which could also be found in modern legal systems. Elon, therefore, defined *Mishpat Ivri*, "Hebrew law," as a subgroup of Jewish law—those parts of traditional Jewish law which dealt with social rather than religious norms (i.e., those norms that today would be classified as dealing with torts, criminal law, contracts, etc.).⁴⁴

However, this relationship between Hebrew law and Jewish law was clearly not the relationship that some revivers had in mind. The term *Mishpat Ivri* was often used by the revivers in other senses. Some used it to designate not only the norms found in traditional Jewish law but also the new norms produced in modern Palestine as part of the process of revival, for example, the norms created by the Hebrew Courts. In other cases, the term was used to denote not only the norms found in Jewish law and the norms produced by the Hebrew courts but also norms produced by other Jewish institutions in Palestine, for example Jewish municipalities, even when these norms were created without any intention of participating in the process of legal revival.⁴⁵

The term was also used in ways which seemed to totally exclude the use of norms taken from the Jewish legal past. In one case, a lawyer associated with the movement talked about *Mishpat Ivri* as including *only* those precedents developed by the Hebrew Courts in Palestine, *not* the norms found in traditional Jewish law.⁴⁶ In other cases, some revivers distinguished between two different bodies of

43. The renewed interest in the idea of legal revival can be dated to the 1970s and 1980s, as secular Zionist culture came under an increasing attack from the Israeli religious Right. See generally Elon, *supra* n. 1, at 1827 ff. See also Washofsky, "Halakhah and Political Theory: A Study of Jewish Legal Response to Modernity," 9 *Modern Judaism* 289 (1989).

44. Elon, *supra* n. 1, at 110.

45. See Eisenstadt, "Le-Heker Mishpatenu ha-Pumbi," (Research of our Public Law), *Ha-Mishpat ha-Ivri: Riv'on Mada'i* 8, 28 (1918); Dickstein, "Mishpat ha-Shalom ha-Ivri," (The Hebrew Courts of Arbitration) 1 *Ha-Mishpat ha-Ivri*, 147, at 149 (1925/6); Dickstein, "Pitsuye Piturin," (Severance Pay) in *Professor Paltiel Daykan [Dikstein]: Mivkhar Monografiyot, Mehkarim u-Ma'amarim* (Professor Paltiel Daykan [Dikstein]: A Collection of Monographs, Studies and Articles) 248 (Yitshak Orren ed., 1975); Daykan, *supra* n. 14, at introduction; Eisenstadt, "Al Hora'at," *supra* n. 33, at 212.

46. See Epstein-Halevy, "Mishpat ha-Shalom ha-Ivri: Kivuno veva-Shikhlulim ha-Drushim Bo," (The Hebrew Courts of Arbitration: Trends and Reforms), 2 *Ha-Mishpat* 120, 128 (1927).

Mishpat Ivri—"historic Hebrew law" and the "new and renewed Hebrew law."⁴⁷ This distinction was not only a way of periodization, a method of pointing to two parts of the same entity, but also served to distinguish between two essentially different things. "New and renewed Hebrew law," said the revivers, was a law created by "life" itself, while "historic Hebrew law" was a dead legal system, now only the province of scholars.⁴⁸

With this ambiguity in mind, it is not surprising that some of the revivers came to the conclusion that "Hebrew law" may have very little to do with the norms of the Jewish past. As early as 1925, Mordechai Eliash, the distinguished vice president of the Hebrew Law Society and the co-editor of its journal, *Ha-Mishpat ha-Ivri*, doubted the possibility of a full scale revival of the norms of Jewish law. He distinguished between form and substance in law. The substance of legal rules changed, he said, "as the nation reaches a higher cultural stage," but the form does not. Therefore only "the form," should be taken from the past, not the substance. What exactly did Eliash mean by this distinction between "form" and "substance"? In 1927, he elaborated this idea by equating "form" with language. The creation of Hebrew law in Palestine, he said, meant translating the present law of Palestine into Hebrew. It did not mean, at least not for the foreseeable future, the revival of substantive norms of Jewish law. Hebrew law thus became equated with "Law in Hebrew"—a law whose only connection with the past would be linguistic.⁴⁹

47. Eisenstadt, "Al Hora'at," *supra* n. 33, at 212. In one case the term *Mishpat Ivri* was used to designate the new law, and Jewish law was called *Ha-Mishpat ha-Ivri ha-Masorti* (traditional Hebrew law). See Friedenberg, "Al ha-Rabanut ha-Rashit be-Erets Yisra'el," (On the Chief Rabbinate of Palestine) 1 *Ha-Mishpat ha-Ivri* 179 (1925/6). In another case, the term *Mishpat Ivri* was used to designate Jewish law and the law created in Palestine was called *Ha-Mishpat ha-Ivri ha-Hadash* (the new Hebrew law). See Tsifroni, "Review: Ha-Mishpat ha-Ivri: Riv'on Mada'i," 1 *Ha-Mishpat ha-Ivri* 153 (1925/6). In the early phases of the movement, some of the revivers used other terms when talking about traditional Jewish law. See e.g., Dickstein, "Takanot Ve'ade Polin ve-Lita al ha-Borhim," (Regulations of the Polish and Lithuanian Committees on Escaping [Debtors]), *Ha-Mishpat ha-Ivri: Riv'on Mada'i* 29, at 30 (1918) (using the term *Mishpat Yisra'eli*—Israelite law); Teplicki, "Dine Mamonot" (Civil Law), *Ha-Mishpat ha-Ivri: Riv'on Mada'i* 77, 78, 104 (1918) (using the terms *Mishpat Yisra'eli* or *Mishpat Yehudi*—Israelite law or Jewish law).

48. Gulak "Le-Sidur Hayenu ha-Mishpatiyim ba-Arets," (On Organizing Our Legal Life in Palestine) 33-34 *Ha-Toren* (1930/1) reprinted in Bazak, *supra* n. 27, at 28. See also Luz, *supra* n. 11, at 19 (discussing the nineteenth century dichotomy between "[Jewish] religion" and "life").

49. See "Ve'idat," *supra* n. 13, at 235; "Ve'idat Orkhe ha-Din ha-Yehudim be-Erets Yisra'el," (the Conference of Jewish Lawyers in Palestine) 3 *Ha-Mishpat* 95, 98-99 (1928) (arguing that the study of "historic Hebrew law" is not yet advanced enough to enable it to serve as the basis of the law of Palestine. However, "law is not determined only by its substance, but mainly by its form," therefore, Jewish lawyers should strive to influence the "form" of the law of Palestine by translating it to Hebrew). See also Dickstein, "Hartsa'ot: 'Al Yesod ha-Pumbiyut be-Dine Karka'ot," (Lectures: On Publicity in Land Law) 3 *Ha-Mishpat ha-Ivri* 189, 190 (1930) (reporting that Eliash suggested that the Jews should avoid the ghettoization involved in using the Hebrew

Another approach, which also rejected a close connection of Hebrew law with Jewish law was that the "Hebrew" essence of the new law was not to be found in its link with traditional norms, nor in its link with the Hebrew language, but with the fact that it was created by the Jews of modern Palestine. This seems to have been the approach of Israel Bar-Shira, a lawyer of the *Histadrut*, the General Federation of Jewish Labour, who argued that the worker tribunals established by this federation applied "Hebrew" law too, not because they used substantive norms taken from what he called "ancient Hebrew law," but because they were an autonomous court system run by Jews in Palestine.⁵⁰

The attempt to distance Hebrew law from Jewish law did not go unnoticed. Eliash's suggestion that Hebrew law should be just "law in Hebrew" was bitterly attacked by some of his colleagues in the Hebrew Law Society. So were the notions of other revivers. Rabbi Simcha Assaf, one of the more conservative members of the revival movement (and an observant Jew) was horrified by the willingness of some revivers to completely renounce the *Halakhah* and to declare that the process of revival demanded a sharp break with the past. In a similar vein, Yehudah Junovits, Assaf's publisher, accused the Hebrew courts of intentionally inventing a "new Hebrew law," with no roots in the legal past.⁵¹

4. ASSEMBLING HEBREW LAW

While Eliash and some of the judges of the Hebrew Courts sought to distance Hebrew law from Jewish law, other revivers claimed that their activity was just a continuation of the work of previous generations, and asserted that their goal was merely to participate in the "weaving of the generational thread of Jewish law."⁵²

Courts of Arbitration and strive instead to strengthen their influence in Government courts). The emphasis on Hebrew language rather than Hebrew law is also apparent in the resolutions of the first convention of Jewish lawyers convened at the same time. The resolutions of the convention called for wider use of Hebrew in (government) courts and called all Jewish lawyers to use only in Hebrew when arguing before these courts, but the resolutions did not call Jewish lawyers to use the Hebrew Courts. See "Ha-Hahlatot she-Nitkablu ba-Ve'edah ha-Artsit shel Orkhe ha-Din ha-Yehudim," (Resolutions of the Conference of Jewish Lawyers in Palestine) 3 *Ha-Mishpat* 45 (1928). See generally, Shavit, "Tarbut Ivrit ve-Tarbut be-Ivrit," (Hebrew Culture and Culture in Hebrew) 16 *Cathedra: For the History of Eretz Israel and its Yishuv* 190 (1980); Benjamin Harshav, *Language in Time of Revolution* 36 (1993).

50. Bar-Shira, "Le-Heker Mahuto shel Mishpat ha-Haverim," (On the Nature of the Labor Arbitration Tribunals), 4 *Ha-Mishpat* 103 (1930).

51. Nehorai, "Ahre ha-Ve'ida," (After the Conference) 3 *Ha-Mishpat* 87, 90 (1928); Simcha Assaf, *Bate ha-Din ve-Sidreham Ahare Hatimat ha-Talmud* (Courts and Procedure in the post-Talmudic Era) 7-8 (1923/4); Junovits, "Al ha-Sifriyah ha-Mishpatit," (On the Legal Library) in Simcha Assaf, *Ha-Onshin Ahare Hatimat ha-Talmud* (Penal Law in the Post-Talmudic Period) 5-6 (1921/2).

52. Grajewsky, "Le-She'elat Hashlatat ha-Mishpat ha-Ivri be-Erets Yisra'el," (Imposing Hebrew law in Palestine) 2 *Ha-Mishpat* 202, 206 (1927); S[amson]

"Jewish law," they argued, constantly renewed itself, and therefore the new laws created by the Hebrew Courts and even the norms formulated by the Jewish municipalities in Palestine should not be seen as breaking with tradition. On the contrary, the relation of this new law to "Rabbinical law" (i.e., the law of the *Talmudic* and post-*Talmudic* eras) was similar to the relations of the *Talmud* to the *Mishnah*. Just as the rabbis of the *Talmudic* period changed *Mishnaic* law, and abolished old legal rules, so could the scholars of the present generation. The changes made in the process of revival, they concluded, did not mean a radical break with the past. They meant continuity.⁵³

But even the most conservative revivers, those who saw Hebrew law as closely connected to the Jewish legal past, those who argued that their activity was part of the "generational thread" of Jewish law, were advocating the creation of a new legal system, not the restoration of an old one. I will first argue that it could not have been otherwise, since it is impossible to restore the legal past. I will then argue that in fact, the revivers were not really interested in restoring the legal past, because their proposed legal system was to be a mixture of old and new elements.

To restore is to change. This was the predicament of those western rulers who were committed to the preservation of non-western indigenous law.⁵⁴ Distilling abstract legal "rules" from the mass of indigenous social norms, ordering them according to western categories, codifying them, uprooting them from their social context and replacing their previous source of authority with the authority of western courts, all were bound, even with the best of intentions, to create something new. Such was also the case with the revivers of Hebrew law. The revivers wanted to subject Jewish law to a process of "scientific and codificatory action."⁵⁵ Traditional norms were to be reassembled according to a skeleton of Roman law categories,⁵⁶ those

R[osenbaum], "Me-Tik Bet Mishpat ha-Shalom ha-Ivri," (From the Files of the Hebrew Courts of Arbitration), 3 *Ha-Mishpat* 17 (1928); "Le-Toldot," supra n. 12, at 209; Dickstein, "Mishpat ha-Shalom ha-Ivri," (The Hebrew Courts of Arbitration) 1 *Ha-Mishpat ha-Ivri*, 147 (1925/6).

53. Tschernowitz, "Al ha-Historyah shel ha-Mishpat ha-Ivri," (On the History of Hebrew Law) 1 *Ha-Mishpat ha-Ivri*, 1, 6 (1925/6); Eisenstadt, "Al Hora'at," supra n. 33, at 209; Dickstein "Ha-Halakhah Rabat Anpin," (Multifaced Halakhah) in *Professor Paltiel Daykan*, supra n. 45, at 131.

54. See e.g., Cohen "Law and the Colonial State in India," in *History and Power in the Study of Law: New Directions in Legal Anthropology*, 131, 142 (June Starr & Jane F. Collier eds., 1989).

55. Eisenstadt, "Review: P. Dickstein, Mishpat ha-Shalom ha-Ivri," 1 *Ha-Mishpat ha-Ivri* 165, 167 (1925/6).

56. See "Review: I. S. Zuri, Mishpat ha-Talmud," 1 *Ha-Mishpat ha-Ivri* 157 (1925/6); "Review: Asher Gulak: Yesode ha-Mishpat ha-Ivri," 1 *Ha-Mishpat ha-Ivri* 162 (1925/6) (discussing the organization of Hebrew law "according to modern science"); Dickstein, "Sha'are," supra n. 27, at 125 (reporting that the organization of the digest of Hebrew law was done according to "the modern scientific method"); Eisenstadt, *Ein*

epitomes of "scientific" categorization for nineteenth century lawyers.⁵⁷ This reordering was bound to change the nature of Jewish law.

But a "scientific" reconstruction of the law was not only to be done by engrafting traditional norms on a Roman structure. It was also to be done by abstracting general principles from the mass of legal rules, and then weeding out those norms that did not accord with these principles. Following European legal scholarship, the revivers saw legal systems as "one whole organic creation" governed by general principles that unified all the rules of the system into a coherent whole. They believed that their task was to replace the "chaotic mixed jumble," of the old law with "a palatial hall . . . whose every part would fit and no small part could be taken out without ruining the harmony that pervades all."⁵⁸ This kind of approach was the logical outcome of the belief that law was a system whose every part reflected the unitary nature of the "national spirit." However, such an approach ultimately clashed with the possibility of accurate historical reconstruction. It meant that Hebrew law would not be a reflection of the Jewish law of the past, but a reflection of an idealized version of it.

Another factor which was bound to change the nature of traditional law had to do with the source of norms in the new legal system. Who was to create Hebrew law? In the past, Jewish legal norms were created by Rabbinical scholars (and to a lesser extent by communal regulations), but the secular revivers of Hebrew law in Palestine were loathe to recognize the unenlightened non-Zionist Rabbis of Palestine as sources of authority. The Rabbis, they said, were conservatives who slavishly followed frozen tradition. They lacked the creativity essential for legal revival.⁵⁹ Instead, the revivers vested the authority to revive the law in the hands of the laymen-dominated Hebrew Courts.⁶⁰ But this proved to be a mistake. The texts in which

Mishpat, supra n. 9 (Organizing Hebrew law scholarship according to semi-Roman categories); Grajewsky, supra n. 52, at 206 (building Hebrew law on a Roman skeleton). But see Asher Gulak, *Yesode ha-Mishpat ha-Ivri* (Principles of Hebrew Law) 13-14 (2d ed. 1967) (rejecting Roman categorization in favor of an "internal" ordering scheme).

57. See e.g., Sugarman, "Legal Theory, The Common Law Mind and the Making of the Textbook Tradition," in *Legal Theory and the Common Law* 26, at 30 (William Twining ed., 1986); F.H. Lawson, *The Oxford Law School 1850-1965*, 35 (1968).

58. Gulak, *Yesode*, supra n. 56, at 3. See also England, "Research in Jewish Law-Its Nature and Function," in *The Jewish Law Annual: Supplement one: Modern Research in Jewish Law* 21, at 40-50 (B. Jackson, ed. 1980), but see Elon, "More About Research into Jewish Law," in *The Jewish Law Annual: Supplement one: Modern Research in Jewish Law* 66, at 72-83 (B. Jackson ed., 1980).

59. See Eisenstadt, "Le-Korot ha-Mishpat ha-Ivri," in *He-Atid: Ma'asef Sifrutit Mada'i le-Berur Inyene ha-Yahadut voha-Yehudim* 192, at 194, 201, 202, 208 (1909/11). See also Cohn, "De'agah shel Yom Etmol," supra n. 42, at 27-28, 33.

60. Yehoshafat, "Hit'hadshut ha-Mishpat," (Legal renewal) 2 *Ha-Mishpat ha-Ivri* 1, at 5 (1937); Daykan, supra n. 14, at 14.

the Jewish law was found were inaccessible to the secular laymen who manned the Hebrew Courts,⁶¹ and the revivers slowly came to realize that the revival of Hebrew law would not and could not be accomplished by the lay judges of the Hebrew courts but only by scholarly codification.⁶² Both the use of the Hebrew Courts and the notion of codification by western educated scholars were a deviation from tradition. These, together with the desire for systemization and Romanization of the law, meant that restoration of the past was impossible.

The impossibility of legal restoration would not have bothered the revivers. Even the most conservative among them did not want to restore the legal past but to create a new entity in which shreds and patches of traditional law would coexist with new elements. There were two methods which the revivers used to decide which parts of the traditional law would be discarded: the distinction between separate legal fields and the distinction between principles and rules.

Some revivers used the distinction between public law (i.e., constitutional law, administrative law and criminal law) and private law to distinguish between parts of Jewish law worth reviving and parts which were not. Private law was seen as worthy of revival, while Public law was seen as unworthy. It was too obsolete, said some revivers, either because it was the first area of law to become disused, or because it was the law of the despised Jews of the "medieval ghettos."⁶³ This distinction was not accepted by all the revivers, some of whom asserted that public law could also be revived,⁶⁴ and some who agreed that private law should be revived first but argued that parts of public law could then be revived.⁶⁵

Other divisions were also used. For example, the revivers sometimes distinguished between "modern" legal fields such as commercial and banking laws, which were universal and in which English

61. *Halakhic* authorities were very rarely mentioned in the decisions of the Hebrew courts. See e.g., *ISA*, Record Group 76, P/636 (decisions of the Supreme Hebrew Court of Arbitration, 1924/5); *ISA*, Record Group 76, P/611 (decisions of the Municipal Hebrew Court, Tel Aviv, 1926/7). Among the few cases in which *Halakhic* authorities were mentioned are *ISA*, Record Group 76, P/636, file 262; *ISA*, Record Group 76, P/636, file 296.

62. See Rosenbaum, "Shgi'ot Mekubalot," (Common Errors) 4 *Ha-Mishpat ha-Ivri* 113 (1933).

63. Gulak, "Le-Sidur," supra n. 27; Dickstein, "Review: Y. Pokrowski," supra n. 45, at 209; Cohn, "De'agah le-Yom ha-Mahar," supra n. 42, at 20.

64. See e.g., Eisenstadt, "Le-Heker," supra n. 45, at 25, 28 (the revival of Jewish public law is a precondition for the revival of Jewish private law); Dickstein, "Le-Harhavah Tarkido shel Mishpat ha-Shalom ha-Ivri," (On Widening the Role of the Hebrew Courts), 1 *Ha-Mishpat* 154 (1927) (discussing the demand for setting up of an administrative division in the Hebrew courts which will deal with taxation, licensing, land expropriation, etc.)

65. Eisenstadt, "Hevrah Mada'it le-Hakirat ha-Mishpat ha-Ivri: Mihtav Galuy," (A Scientific Society for Research of Hebrew Law: An Open Letter), in Eisenstadt, *Tsiyon*, supra n. 12, at 31, 32.

law could be used, and "older" legal fields like property, which were more particular and in which traditional norms had to be employed. A variant of the same division was the distinction between commercial and penal laws on the one hand and family and land law on the other.⁶⁶ A third dividing line was between substance and procedure, a division according to which only substance was worthy of revival, not procedure.⁶⁷

Another method of division was between principles and rules. The revivers often argued that only "principles" of Jewish law were worthy of revival.⁶⁸ In this context they often used the spirit-letter metaphor. For example, the Hebrew courts were said to be loyal to "the *spirit*" of traditional law but not to its "dead letters." Hebrew law was to follow "the *spirit* of the ideals of our prophets and scholars" but not the letter of their norms.⁶⁹ This metaphor fit neatly with the idea of "revival," but other metaphors were also used, for example, the distinction between "facade" and "interior."⁷⁰ The separation of rules and principles enabled the revivers to neutralize all undesirable aspects of Jewish law. For example, the Hebrew courts bypassed the problem of the religious nature of Jewish law by declaring that they were only committed to its "principles," i.e., "justice and equity, charity and truth," not to the welter of its religious rules.⁷¹ Of course, with such a formula, not much was left of traditional law.

In addition to discarding parts of the old law, the revivers intended to import new elements which would turn Hebrew law into a synthesis of "historical and modern elements."⁷² The conception of synthesis played a complicated role in revival thought. The revivers believed that there was an organic link between law and society, that law could not be universal, that "the conditions of time and place"

66. Freimann, *supra* n. 27, at 36, 47; Daykan, "Le-'Atido shel ha-Mishpat ha-'Ivri," (On the Future of Jewish Law) in Bazak *supra* n. 27, at 75, 76.

67. Grajewsky, *supra* n. 52, at 206 ("we should take legal procedure, i.e. judicial technic, the process of the trial and also the ways of punishment—those things external to the law and its execution—from others or maybe we should leave it to the Government courts.")

68. See e.g., Daykan, *supra* n. 66, at 75, 84 ("there is no need to keep the minute details [of Jewish law] but instead one can use the principles and the spirit of Jewish law.")

69. Dickstein, "Mishpat," *supra* n. 45, at 149; Dickstein, "She'elat ha-'Ona'ah be-Mishpat ha-Shalom ha-'Ivri," (The Question of Fraud in the Hebrew Courts of Arbitration), 1 *Ha-Mishpat ha-'Ivri*, 150, 151 (1925/6); "Ve'idat," *supra* n. 13, at 235; Tsifroni, "Review," *supra* n. 47, at 154.

70. Grayewsky, "Le-She'elat," *supra* n. 52, at 206.

71. See Daykan, *supra* n. 14, at 14-15.

72. Junovits, "Al ha-Sifriyah ha-Mishpatit," (On the Legal Library) in Assaf, *Ha-Onshin*, *supra* n. 51, at 7; Bet ha-Sefer Ha-Gavohah le-Mishpat ve-Kalkalah, (The School of Law and Economics) 5 *Ha-Mishpat Ha-'Ivri* 297 (1934/5). See also Orren, "Professor Paltiel Dickstein: 1883-1969: Kavim le-Dmuto u-Po'alo," (The Late Professor Paltiel Dickstein: 1883-1969: Biographical Notes) in *Professor Paltiel Daykan*, *supra* n. 45, at 22, 25.

determined the shape of the legal system.⁷³ In all national legal systems, they said, organically created national law which reflected the *volksgeist* was the rule, influence of foreign legal systems was the exception. A wholesale reception of foreign law, like the reception of European law by Turkey and Japan, was impossible. Law could not be successfully transplanted from the social and historical context in which it grew. The reception of foreign law, they believed, was just a sign of "political weakness and unawareness."⁷⁴

The idea that foreign norms should be rejected was supported by the nineteenth century ideal of purity and its complementary notion—hybridity. Hybridity was a major concern of nineteenth century European thought, especially of nineteenth century racial theory. Originally a biological concept denoting any infertile crossing between species, the notion of hybridity was taken by racial thought and applied to human crossovers, and also to cultural ones. Closely connected to the fear of hybridity was the nineteenth century obsession with rigid, clear-cut boundaries, which also entailed a suspicious attitude to cultural mixture.⁷⁵

The concept of hybridity, with its accompanying undertones of infertility, also appeared in revival thought. Hybridity was connected with the Jewish Exile, and oriental culture. It was also seen as the mark of Ottoman law, the source of many of the norms of the legal system of Palestine. Ottoman law was described as a "hybrid [and] castrated" system composed of the "cultural refuse" of various nations, transferred into the Ottoman Empire in a "castrated form" by "uneducated cultural pimps." Hebrew law, declared the revivers, must be uncontaminated by foreign influences.⁷⁶ The revivers even

73. See Ha-Ma'arekhet, "Te'udatenu," (Our Goal), *Ha-Mishpat ha-'Ivri: Riv'on Mada'i* 1, 6 (1918); Eisenstadt, "Le-Heker," *supra* n. 45, at 24, 28; Daykan, *supra* n. 14, at 68; Dickstein, "Al Bet ha-Sefer ha-Gavohah le-Mishpat ve-Kalkalah," (On the School of Law and Economics), undated speech, CZA, A212/32, 2; Paltiel Daykan, *Dine Onshin be-Yisrael u-Be'amim: be-Avar uba-Hove* (Criminal Law with Special Reference to the History of Jewish Law and to the Law of Israel) (2d ed. 1955), introduction to first edition of 3d volume, introduction to the second edition.

74. "Le-Toldot," *supra* n. 12, at 220-22; Yehoshafat, *supra* n. 60, at 2-3; Rosenbaum, "Shitat ha-Hashva'ah be-Torat ha-Mishpat," (Comparative Law) 1 *Ha-Mishpat* 3, 8 (1927); Grajewsky, "Le-She'elat," *supra* n. 52, at 202, 203; Hevrat ha-Mishpat ha-'Ivri bi-Yerushalayim, *Karoz le-'Askene Yisra'el ule-Sofrav ve-Hakhamav ba-Arets uva-Golah* (A Proclamation to Jewish Politicians, Writers and Scholars in Palestine and Abroad), CZA, A417/82 (1928).

75. See e.g., Robert J. C. Young, *Colonial Desire: Hybridity in Theory, Culture and Race* 99-117 (1995); E. J. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* 108 (2d ed. 1992); Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* 33 (1995).

76. Daykan, *Dine Onshin*, *supra* n. 73, at introduction to second edition, 32 (Israeli society is "a collection of Diasporas which have not yet stuck roots and achieved internal fusion." and the Jews are "an assorted collection of immigrants."); Dickstein, "Tehiyat Mishpatenu be-Yadenu," (The Revival of Our Law will be Determined by Us) *Ha-Arets* 2 June 1927 (Ottoman law, is a "Levantine system, which is merely a mechanical mixture of Arab-Moslem, Turkish-Ottoman, French, Italian and British

believed that one of the unique characteristics of Jewish law was that it withstood the influence of many nations and did not succumb to the lure of other legal systems.⁷⁷

But the rejection of foreign influence always existed in revival thought side by side with the recognition that revival would mean the acceptance of foreign legal influence, and that Hebrew law would have to be a "synthesis of eastern and western law," a mixture of "traditional law, [and] the legal notions . . . brought from Europe."⁷⁸ The acceptance of foreign influence was sometimes transformed into a belief that foreign influence was the essence of revival. Paltiel Dickstein, one of the leaders of the movement, was especially enamored with the notion of mixture. In 1927, he called for "the renewal of our law by mixing its original elements with western, Roman based elements." In 1935, he said that the Tel Aviv school's purpose was to train law students who would be used from the start "to blend the historical with the new, the national with the universal, the Eastern with the Western, a judicious and harmonious blend."⁷⁹ He once even claimed that the essence of Zionism was its relaxed attitude toward mixture. Only sick Diaspora Jews separated the national from the universal, he observed in 1940. Synthesis of the particular and the universal was the mark of "healthy territorial life."⁸⁰

Scientization of traditional law, codification, abstracting general principles and discarding specific rules, rejecting traditional sources of authority for the creation of new norms, subtracting obsolete parts and adding new parts and norms taken from western law (thus creating a hybrid legal system), all these actions were bound to produce a new legal system different from anything previously known in the history of Jewish law. The difference became even more marked, as I shall argue in the next section, because the revivers were also com-

elements, . . . often in a castrated form"); Frumkin, "Ha-Mishpat ha-Noheg be-Erets Yisra'el ba-Zman ha-Ze," 1 *Ha-Mishpat ha-Ivri* 137 (1925/6) (Palestine is a country whose main characteristic is its lack of homogeneity); Eisenstadt, "Medinyut u-Mishpat" (Politics and Law), 15 *Ha-Olam* 404 (May 27, 1927); "Review: M. Dukhan, Dine Karka'ot be-Erets Yisra'el," (Land Law in Palestine), 1 *Ha-Mishpat ha-Ivri* 167 (1925/6); Nehorai, "Ahre," supra n. 51, at 90, 91; Yehoshafat, "Hithadshut," supra n. 60, at 1.

77. Tschernowitz (Rav Tsa'ir), "Al ha-Historyah shel ha-Mishpat ha-Ivri," (On the History of Hebrew Law), 1 *Ha-Mishpat ha-Ivri*, 1 (1925/6).

78. Eisenstadt, "Bi-Sha'are," supra n. 35, at 3; "Ve'idat Mishpat ha-Shalom ha-Ivri: Din ve-Heshbon," (Hebrew Law Courts Conference: Report), 2 *Ha-Mishpat* 97, 98 (1927).

79. Dickstein, "Review: Y. Pokrowski," supra n. 34, at 209; Dickstein, "Ha-Mosad he-Hadash," in *Bet ha-Sefer*, supra n. 38.

80. Daykan, *Dine Onshin*, supra n. 73, at introduction to the first edition 1940; School of Law and Economics: Tel Aviv, "To the Friends of the Hebrew Science in the World," (n.p., n.d.), *CZA*, A212/32. The idea that Zionism strives for a synthesis of the particular and the universal was often found in contemporary literature. See e.g., Klausner, "Li-F'tihat ha-Makhon le-Mada'ey ha-Yahadut," (On the Opening of the Institute of Jewish Studies) in *Ha-Universitah ha-Ivrit bi-Yerushalayim: Kovets Ma'amarem* (The Hebrew University in Jerusalem: A Collection of Articles) 34 (1925).

mitted to the suppression of those parts of Jewish law that did not fit easily with Zionist ideology at the time.

5. SELLING HEBREW LAW

5.1 Forgetting the Past

The features of the legal system that the revivers wanted to create for the Jews of Palestine were heavily influenced by the need of the revivers to produce an image of Hebrew law which would be acceptable to their community—the Zionist Jews of Palestine. The need to shape Hebrew law in their own image led the revivers to propose a system that reflected Zionist ideology and identity. Since Zionist identity was constructed mainly in relation to two images of the Other—the Jew of the Diaspora, and to a lesser extent, the Palestinian Arab, much of revival literature can be seen as an exercise in exorcising the Exilic and Oriental traits of Jewish law, and thus fitting this law into the Zionist mold.

Many revivers accepted the notion that Hebrew law should be connected to the historic body of legal rules found in Jewish law. But the revivers did not treat all the periods of the national legal past as deserving the same respect. The roots of this attitude lay in the ambiguous relationship of nationalism to its past. Nationalism is a backward-looking phenomenon. Nationalists seek to reconnect the national present and future with the national past. On the other hand, nationalism is forward-looking in the sense that it is often a revolutionary ideology striving to reshape and transform society.⁸¹ This forward-looking aspect of nationalism is also influenced by the fact that European nationalism arose in an era when the dominant historical paradigm was evolutionary. Such a paradigm could only mean a rejection of the past, which represented a lower stage of evolutionary development.

One of the ways in which nationalist ideology tried to reconcile these two contradicting trends was by distinguishing between two "pasts": the recent, degenerate past, and the distant, purer (and invented) past: the times of the Gauls in France, the age of the Roman Empire in Italy, the Middle Ages in Germany. In the specific context of Zionism, the distinction came to be between the "degenerate" recent past of the Jewish Exile, and the ideal past of Jewish antiquity.⁸² The revivers thus had to erase the mark of Exile from their version of Jewish legal history.

Most of the revivers associated Hebrew law with the law of the *Talmudic* periods. Post-*Talmudic* law, despite being the most prolific period in Jewish legal history, was ignored or marginalized. One rea-

81. See e.g., Anderson, supra n. 4, at 155-61.

82. See generally, Zerubavel, supra n. 5, at 15-36.

son was that post-*Talmudic* texts were more numerous and less accessible. Another reason was that many Zionists distinguished between two parts of Jewish history—a “creative” period, and a period of a “loss of creative power.”⁸³ Post-*Talmudic* law belonged to the second period. It was the law of the “medieval” ghettos. It was the product of “a degenerate weak Jewry,” huddled and fenced off inside “tall and dark walls.” It was a law unfit for new, Zionist Jews.⁸⁴

But the revivers were also ambivalent about the *Mishnaic* and *Talmudic* periods. On the one hand, these periods were certainly the most creative periods of Jewish legal history. They were the time when the major texts of the Jewish law were produced. On the other hand, creativity was associated in Zionist thought with political independence, while the *Mishnah* and the *Talmud* were compiled after the loss of Jewish independence. One example of this ambivalence was the fact that the revivers adopted the term *Mishpat Ivri*, with its biblical connotations, instead of using terms like *Mishpat ha-Talmud* (*Talmudic* law), which were also common in nineteenth century legal scholarship. This use indicated their desire to associate their law with biblical “Hebrews” rather than with the “Jews” of the *Talmudic* period.⁸⁵

The same ambivalence was also expressed in other ways. For example, in one of his early articles, Eisenstadt used Zionist imagery to contrast the legal dynamism and creativity of the law before the destruction of the Second Temple with the period after its destruction. In the first period, “the Hebrew nation was not uprooted, but feeding from its soil, working and fighting.” It was a period when the “bustle of [legal] creativity was heard throughout the land.” The *Mishnaic* period, in contrast, was a “period of decline” when the “echo of ordinary daily life was silenced.”⁸⁶ The *Mishnah* and *Talmud*, however, contained the sources for legal revival, and Eisenstadt had to concede that “the [*Talmudic*] academies were not yet totally removed from life.”⁸⁷ When he tried to describe the *Talmud* itself he also vacillated.

83. Dickstein, “Sha’are,” supra n. 27, at 129. See also Elon, supra n. 1, at 88. But see Simcha Assaf, *Ha-Onshin Ahare Hatimat ha-Talmud* (Penal Law in the Post-*Talmudic* Period) 12 (1921/2) (noting the “common view” that the post-*Talmudic* period was uncreative, and then criticizing it). See generally Luz, supra n. 11, at 159-72.

84. See Eisenstadt, “Le-Heker,” supra n. 45, at 19; Cohn, “De’agah le-Yom ha-Mahar,” supra n. 42, at 20-21.

85. See generally Harshav, supra n. 49, at 135-36, 142-3; Luz, supra n. 11, at 167; Zerubavel, supra n. 5, at 26.

86. Eisenstadt, “Le-Korot,” supra n. 59, at 201, 202.

87. Eisenstadt, id., at 207. Another version of the same problem was the question of the relationship between the Palestinian *Talmud* and the Babylonian *Talmud*. Despite the fact that the Babylonian *Talmud* was created in the Diaspora, it, and not the Palestinian *Talmud* was the dominant version of the *Talmud*. This conflicted with the Zionist notion about the importance territory for Jewish legal creativity. Eisenstadt acknowledged the dominance of the Babylonian *Talmud* but tried to justify it by pointing to the destruction in Palestine as the reason for the “miserable” state of the

Like many Zionists,⁸⁸ Eisenstadt was slightly embarrassed by the chaos and irrationality of the *Talmud*, but at the same time he also praised these very same attributes, because he was forced to admit that the *Talmud* was the main source of Jewish law.⁸⁹

5.2 Discarding Religion

Many of the early advocates of legal revival were devoted secularists, who rejected religion.⁹⁰ One of the reasons for the creation of the Hebrew Courts of Arbitration was to free Zionist Jews from the tentacles of Rabbinical Courts of the old *Yishuv*.⁹¹ These tendencies were perceived by orthodox Jews in Palestine, who rejected the commitment of the revivers to the secularization of Jewish law.⁹² Consequently, the relationship between rabbinical authorities in Palestine and the institutions of Hebrew law—the Hebrew Courts and the Hebrew Law Society—were often strained.⁹³

Secular Zionists associated religion with the hated condition of the Exile and with the Middle Ages. The desire to free Jewish law from the “shackles of the Middle Ages, so it becomes a national and not religious concept,” was therefore strictly in line with Zionist ideology. But secularization may also be attributed to the influence of nineteenth century legal positivism. Legal Positivism, following the liberal distinction between public and private, strove to separate (public) law from (private) religion and morality. The very essence of

Palestinian *Talmud*. Eisenstadt, id. at 204. On the importance of territoriality in Zionist ideology, see Zerubavel, supra n. 5, at 15.

88. See e.g., Harshav, supra n. 49, at 124; Charles S. Liebman and Eliezer Don Yehiya, *Civil Religion in Israel: Traditional Judaism and Political Culture in the Jewish State* 69 (1983) (discussing the Bible-*Talmud* dichotomy in various strands of Zionist thought).

89. Eisenstadt, “Le-Korot,” supra n. 59, at 207, 209 (“Jewish law is revealed in all its glory from the chaos in the sea of the *Talmud*, and demands its redemption from the bounds of time and the rust of ages.”; “The *Talmud* is a truly Oriental creation. It does not tolerate logical order, because it is not born of limited complacent reason. It is the child of legal reasoning (*sevarah*), full of emotion, full of desire for truth, longing for the good, for the complete for the absolute . . . it still sucks from the source of live religion, full of the noises of life.”)

90. Secularism was a dominant feature of the Russian-Zionist milieu from which revivers like Eisenstadt and Dickstein came. See e.g., Luz, supra n. 11, at 143.

91. Gil-Har, supra n. 7, at 208.

92. See e.g., Cohn, “De’agah le-Yom ha-Mahar,” supra n. 42, at 18; Bar-Shira, “Le-Heker Mahuto shel Mishpat ha-Haverim,” (On the Nature of the Labor Arbitration Tribunals), 4 *Ha-Mishpat* 103 (1930).

93. See e.g., “Ta’arhim Biyografiyim le-Yovel ha-70 shel ha-Profesor Shmuel Eisenstadt,” (Biographical dates on the Occasion of the 70 Birthday of Professor Samuel Eisenstadt) (1956), *CZA*, A 212/63; Dickstein, “Mishpat,” supra n. 45, at 148; Eisenstadt, “Review of: P. Dickstein, *Mishpat ha-Shalom ha-Ivri*,” 1 *Ha-Mishpat ha-Ivri* 165, 166 (1925/6); Friedenber, “Al ha-Rabanut ha-Rashit be-Erets Yisra’el,” (On the Chief Rabbinate of Palestine) 1 *Ha-Mishpat ha-Ivri* 179, 180 (1925/6); Dickstein, “Skhirut Drot,” (Apartment Leases), 2 *Ha-Mishpat ha-Ivri* 109, 110 (1926/7); Daykan, supra n. 14, at 28; Gil-Har, supra n. 7, at 208; Menachem Elon, interview by author, New York, 21 November 1995.

a "scientific" study of law, according to legal positivism, was to divorce law from religion. Secularization of the law was therefore also an essential part of its "scientization."⁹⁴

Thus, the revivals had to face the thorny question of how to secularize traditional Jewish law, in which "secular" and "religious" norms and concepts were inseparably mixed. The problem was aggravated by the holistic nature of Historical School thought. The revivers, like their German predecessors, believed that law "is an organic creation, a complex branch-like mechanism whose different parts are held and glued together and influence each other and one [part] cannot be reformed without touching and damaging another."⁹⁵ If that were the case, how could legal norms be separated from religious ones?

The revivers were unable to conclusively answer this question.⁹⁶ They admitted that the border between law and religion in Judaism was "difficult to determine," and that religion was the very source of Jewish culture and law.⁹⁷ But they also claimed that law and religion could be successfully separated. Law, they asserted, was associated with religion only in one distinct phase in Jewish history, the period of Exile. Jewish law assumed its religious aspect only during that period. Religion was a "mask," "dress," "shell," or "shackles" which law had put on itself, and which could be easily taken off. Religion was a temporary "hiding place" or "prison" from which law would soon emerge. The "secular" nature of Jewish law, hidden by the "mystical mists [of Exile]," would soon be revealed. Law would then "wear

94. See Grajewsky, "Ha-Memshalah veka-Knesiyah, ha-Mishpat veka-Dat," (State and Church, Law and Religion) 2 *Ha-Mishpat ha-Ivri* 83 (1926/7). See also Rosenbaum, supra n. 62, at 114 (blaming "Christian scholarship" for the "false" identification of Jewish law with religion); "Obituary: Josef Kohler," 1 *Ha-Mishpat ha-Ivri* 172 (1925/6) (praising Kohler as the first scholar to look at Jewish law from a non-theological, "legal scientific" point of view). The attempts to secularize Jewish law appeared simultaneously with attempts of Turks and Arabs to secularize the *Shari'a*. See generally Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim Society* 60 (1993).

95. Savigny, supra n. 8, at 24. See also Gulak, supra n. 56, at 3 ("it is a known and accepted truth that the individual laws of every nation are tied and united to each other and one spirit enlivens them and weaves them together" which means that once the legal system is scientifically organized, there emerges a "legal order whose every part fits in, and no small part can be taken out without ruining the harmony which rules all.")

96. The role of religion in Jewish law was discussed in England, "The Problem of Jewish law in a Jewish State," in *Jewish Law in Ancient and Modern Israel* 143 (H. Cohn, ed. 1971); England, "Research in Jewish Law," supra n. 58; Elon, "More About Research into Jewish Law," supra n. 58; Elon, supra n. 1, at 111.

97. Inseparability of law and religion was also the logical conclusion of the claim sometimes accepted by the revivers that Jewish law was an oriental legal system, since the mark of Oriental legal systems, according to European legal theory, was that they were religious. Eisenstadt, "Le-Korot," supra n. 59, at 196, 203, 207, 208; "Te'udatenu," supra n. 73, at 1. See also Frederic M. Goadby, *Introduction to the Study of Law: A Handbook for the Use of Egyptian Law Students* 79, 84 (1910) (discussing the religious character of oriental legal systems).

a modern dress and be taken from the corner of the *Talmudic* academy to the public secular life of Judaism."⁹⁸ The revivers even maintained that the separation of Hebrew law from Jewish religion was not revolutionary, but actually part of the very tradition of change in Jewish law. Just as various generations of Jewish scholars abrogated old norms or added new ones as society changed, so this generation could abrogate the religious parts of the law.⁹⁹

5.3 Re-Orienting the Law

Just as the revivers found it difficult to overcome the secular/religious dichotomy when they came to apply it to Jewish law so it was with the East/West dichotomy. Revival thought hovered indecisively between two different images of East and West. One was the orientalist image of the East as a culturally backward place, inferior to the West in almost every respect: A place of decadence, of chaos and hybridity, irrationality and emotionalism.¹⁰⁰ But the revivers were also influenced by another image according to which Eastern culture was actually superior to the culture of the West, coupled with a belief that "in the course of time the center of civilization will pass from the declining West to the awakening East."¹⁰¹

Jewish law was identified in revival literature both with the East and with the West, but the general trend over the years was to reorient Jewish law—to try to distance it from Oriental legal systems. The changes in orientation were due less to any inherent characteristic of Jewish law and more to general changes in Zionist public and

98. See Grajewsky, "Ha-Memshalah," supra n. 94, at 89 (using the medieval shackles metaphor); Eisenstadt, "Le-Korot," id., 192 (Jewish law now "seeks to be released from the books in which it was hastily put at the times of trouble and distress"); Dickstein, "Review: Kitve M. Z. Rapaport al ha-Mishpat ha-Ivri," (The Works of M. Z. Rapaport on Hebrew Law) 1 *He-Avar* 198, 199 (1918) ("the religious shell must not obscure the healthy [secular] core of Jewish law"); Eisenstadt, "Le-Heker," supra n. 45, at 20 (Jewish public law "is given a seemingly religious color" but we can "take off its religious mask"); Eisenstadt, "Hevrah Mada'it le-Hakirat ha-Mishpat ha-Ivri: Mihtav Galuy," (A Scientific Society for Research of Hebrew Law: An Open Letter), in Eisenstadt, *Tsiyon*, supra n. 12, at 31, 32 ("we are living in the period of revival of the social values of Israel, which had been hidden during all the years of Exile in the parchments of our religious literature."); Daykan, supra n. 14, at 14-15, 68 (Jewish law was not created by religion but that it "absorbed religious and moral concepts," and the Hebrew Courts were to renew the principles of Jewish law without their religious color [tsivyon] and "without tying them with the shackles of religion.")

99. Tsifroni, "Mishpat Hiloni ba-Me'ah ha-17," (Secular Law in the Seventeenth Century), 1 *Ha-Mishpat Ha-Ivri* 204 (1925/6); Eisenstadt, "Al Hora'at," supra n. 33, at 213.

100. See generally Edward Said, *Orientalism* (1979).

101. Meyer Dizengoff, "Palestine—A Center for Higher Education," in *School of Law*, supra n. 36, at 3, 5. See also Daykan, supra n. 73, at 32 (noting the "marks of decline and degeneration" which characterize western culture). The idea that modern western culture was degenerating was, of course, a main theme of late nineteenth century European thought. Indeed, one of the early leaders of the Zionist movement, Max Nordau, was also a leading proponent of the notion of degeneration. See Max Nordau, *Degeneration* (1895).

cultural opinion over time. Early Zionists saw themselves as orientals, and this was reflected in Zionist cultural activity—literary, artistic, architectural—in Palestine in the 1910s and 1920s. By the 1930s, however, Zionists came more and more to see themselves as a bastion of western culture in the Orient, and romantic orientalism was replaced with modernist fashions.¹⁰² This shift was reflected in revival thought: the pro-Eastern trend in revival thought seems to have been stronger in the beginning of the century.¹⁰³ In the 1910s and 1920s, pro-Eastern sentiments dominated revival literature. “The Hebrews,” said Eisenstadt in an early article, “were a typical Eastern nation,” and “Jewish law was born in the bosom of general Semitic law.”¹⁰⁴ Hebrew legal revival was to be part of the “revival movement of the Orient,” and the development of Hebrew and Islamic law “will converge and blend in the future.”¹⁰⁵ In the 1920s, Dickstein often noted the similarity between Jewish and Islamic law, and the “thousands of ties” which tie the Jews to the East. He even expressed the very unconventional view that keeping Islamic law as the law of Palestine was better than importing English law. The similarity of Jewish and Islamic law, he argued, meant that law could serve as a place in which “Jews and Arabs can collaborate . . . without renouncing their heritage.” Islamic law could therefore “assist in the spiritual convergence of Jews and Arabs.”¹⁰⁶

102. See generally Patai, “On Cultural Contact and its Working in Modern Palestine,” *American Anthropologist* (N.S.) 4, 5, 19-21 (1946); Laqueur, supra n. 11, at 228, 243, 268; Baruch Kimmerling, *Zionism and Territory: The Socio-Territorial Dimensions of Zionist Politics* 184-88, (1983); Nurith Gertz, *Shvuyah ba-Halomah: Mitosim ba-Tarbut ha-Yisra'elit* (Captive of a Dream: National Myths in Israeli Culture) 38-43 (1995).

103. But one can also point to a contrary trend. For example, in 1934 Moshe Silberg expressed a pro-Western approach. In 1938, he reversed his position and criticized Western law. Finally, in 1947, as the Jews were preparing for battle with the Arabs, he decided that they should turn their backs both on Western and Eastern culture in favor of an extreme particularist position, according to which there is an “eternal difference” between Jews and Gentiles. See Silberg, “Kinus ha-Yurisditsyah ha-Erets Yisra'elit,” (Collecting Palestine Decisions), in *Ba'in ke-Ehad: Asufat Dvarim shebe-Hagut uba-Halakhah* (In Inner Harmony: Essays and Articles) 111 (Zvi Terlo and Meir Hovav eds., 1981); Silberg, “Orientatsyah Tarbutit,” (Cultural Orientation), id. at 94; Silberg, “Ha-Enoshut le-'An?,” (Whither Humanity?), id. at 98.

104. Eisenstadt, “Le-Korot,” supra n. 59, at 201.

105. Eisenstadt, “Bi-Sha'are,” supra n. 35, at 3.

106. Dickstein, “Ha-Mejelle ve-Hoshen Mishpat,” (The Mejelle and Hoshen Mishpat) 1 *Ha-Mishpat ha-Ivri* 193 (1925/6); Dickstein, “Review: Be'ur ha-Shalem shel ha-Mejelle,” 5 *Ha-Mishpat ha-Ivri* 291, at 292 (1936/7); Dickstein, “Review: Mejelle,” 3 *Ha-Mishpat Ha-Ivri* 169, 170 (1928); Dickstein, “Skhirut Dirot,” supra n. 93, at 111. But see “Be-Hevrat ha-Mishpat ha-Ivri: Snif Tel Aviv,” (In the Tel Aviv Branch of the Hebrew Law Society) 1 *Ha-Mishpat* 197 (1927) (summarizing a lecture given by Dickstein in which he said that the leasing provision of the Mejelle were “the relics of ancient Turkish views, unnecessarily burdening our public life without reason or cause.”) The classification of Jewish law as oriental was common in revival works. See Grajewsky, “Le-She'elat,” supra n. 52, at 205; Dukhan, “Ha-Mishpat ha-'Ezrahi be-Erets Yisra'el,” (Civil Law in Palestine) 2 *Ha-Mishpat* 280 (1927).

One should not overemphasize the pro-Eastern sentiments of the revivers. The notion that Jewish law was an oriental law was not used to equalize relationships between Jews and Arabs but to support the argument that the Jews should become the leaders of the “New Orient.” Before Exile, said Eisenstadt “all the Orient was full of the glory [of our law].” Now the East calls for its reawakening.

History calls us . . . look to the shores of the Arab sea and the rivers of India! Great and ancient oriental nations awake from the slumber of the ages and fight for their liberty. A Commotion of revival is heard in the halls of ancient culture, in the hall of the biblical world. A new and enlightened society is being formed on the shores of Asia and in its laws and social customs the spirit of religion is reflected in its pure oriental form . . . The Orient longs and yearns for the revelation of a stern (*takif*) and original oriental law, which sucks and feeds from the source of oriental religion. To such an oriental society . . . we should bring our perfect law, the law of the ancient Semitic nation, first and foremost of the enlightened nations of western Asia.¹⁰⁷

In a similar vein, when Dickstein discussed the resemblance of Jewish and Islamic law, he attributed it to “the direct and indirect influence of Jewish law on the laws of the people of the East.” “What Roman law was to the people of the West,” he said, “Jewish law . . . was to the people of the East.” In addition, Dickstein was also quick to note the dissimilarities between Jewish and Islamic law. First, “Jewish law is suffused to a greater extent with moral values and individualism.” Secondly, Jewish law was influenced by the western culture while Islamic law was not. Therefore, concluded Dickstein, the Jews should refrain from adopting Islamic rules because “such an imitation would mean cultural and moral decline in comparison with our legal views.”¹⁰⁸

As the tensions between Arabs and Jews increased, conceptions of Islamic and Ottoman law changed accordingly. Ottoman law was described in the 1940s as “a motley crowd of ancient, transferred and uprooted laws.” Ottoman law was not only inadequate, it was also dangerous. The revivers often talked about the “cultural-moral loss” caused to the Jewish community by the exposure to “undeveloped Ottoman law.”¹⁰⁹ Criticism of Ottoman law went hand in hand with racial descriptions of Palestinian Arabs, as “primitive, childish and

107. Eisenstadt, “Le-Korot,” supra n. 59, at 208 (1909/11). See also “Ve'idat,” supra n. 13, at 235.

108. Dickstein, “Ha-Mejelle,” supra n. 106, at 194.

109. Cohn, “De'agah le-Yom ha-Mahar,” supra n. 42, at 16; Epstein-Halevy, “Mishpat,” supra n. 46, at 125; Eisenstadt, “Medinyut,” supra n. 76, at 404; “Ve'idat Orkhe,” supra n. 49, at 96, 98; Nehorai, “Ahre,” supra n. 28, at 90.

infantile," and Yemenite Jews, who were described as "naive and primitive."¹¹⁰

Such views led the revivers to demand a legal separation from the Arabs, on the basis of the curious argument that only Arabs, not (European) Jews could commit "real" crimes. For example, in his book on criminal law, first published in 1940, Dickstein noted that the Palestine law maker has to

adapt the punishment system to the low cultural level of a part of the population, awash with serious crimes, the fruit of rude passions, beastly inclinations and simple instincts, but. . . [the law maker] cannot measure with the same yardstick complex criminality, the fruit of mental complexes of civilized people who came to the country with their delicate emotions, developed senses and tense nerves, people that have reached a refined and sickly stage of mental development. This means the Jewish immigration from the countries of the West, whose crimes are intricate and complex, sometimes because of their fragile mental composition and sometime because of their ways of execution which are full of deceit and fraud, but seem, superficially, legal and orderly.¹¹¹

The demand for legal separation was reflected in the attempt to distance Jewish law from Islamic law, since oriental culture and oriental law were conventionally seen as belonging to a low stage of evolutionary development.¹¹² Some revivers took great pains to show that western scholars erred in classifying Jewish law as an "oriental legal system" because Jewish law lacked some of the marks of "true" oriental legal systems such as "fatalism and total passivity," and "disregard for individualism."¹¹³

The ambiguous attitude toward oriental law was mirrored in the attitude of the revivers to western law. The revivers could not produce a clear statement on the desirable relationship between Hebrew and western law. A sizeable group of Jewish lawyers in Palestine called for the replacement of Ottoman law by a "wholesale reception"

110. Nofekh, "Ha-Yarhon ha-Mishpati ha-'Arvi Al-Hukuk," (The Arab Law Journal: Al-Hukuk), 1 *Ha-Mishpat Ha-'Ivri* 169, 171 (1925/6); L. Y., "Ha-Havay veva-Mishpat," (Custom and Law) 1 *Ha-Mishpat* 169 (1927). See also V. G. Kiernan, *The Lords of Human Kind: Black Man, Yellow Man and White Man in an Age of Empire* 153, 233 (1986) (discussing the association of "childishness" with "inferior" races).

111. Daykan, supra n. 73, at 37-38. See also Dickstein, "Mishpat," supra n. 45, at 148; Grajewsky, supra n. 52, at 206.

112. See e.g., Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right* 377-78 (Allen W. Wood ed., 1991); Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its relation to Modern Idea*, with an introduction and notes by Sir Frederick Pollock, New Edition, (1930); Goadby, supra n. 97, at 79, 84; Michel Hulin, *Hegel et l'Orient* (1979).

113. See e.g., Yehoshafat, "Shilton ha-Hok," (The Rule of Law), 3 *Ha-Mishpat Ha-'Ivri* 1, 3 (1927/8).

of English law.¹¹⁴ But the revivers were opposed to anglicization, which was compared to the deplorable adoption of Greek ways by assimilated Jews during the times of the Maccabeans. Anglicization, like Hellenism, would lead to "political and cultural assimilation." It was a crime and a constant threat to the future of the Jewish people, a sign of "a national and cultural enslavement," and an evidence of the "excessive eagerness for [things] foreign, which is the mark of Exile."¹¹⁵

The reception of other western legal systems was also rejected. Asher Gulak rejected the idea that substantive Roman norms could be adopted, because "Rome and Jerusalem are the furthest of antitheses." And Moshe Silberg, writing in 1938, dismissed the idea that the German or Swiss codes could serve as a model for the law of the future Jewish state, because "there is nothing more abominable than the German spirit."¹¹⁶

But this rejection was not wholehearted. The revivers sometimes stated that their goal was "blending the legal views of England with the national views of the Jews."¹¹⁷ They spoke of their general affinity to European law. They called for the adoption of certain English doctrines, and suggested that the revived law would be a combination of Jewish and Roman norms and concepts.¹¹⁸ Their vision of the nature of Hebrew law, therefore, remained suspended between East and West.

5.4 *Universalizing the Law*

The revivers criticized their Jewish predecessors for their apologetic tendencies. They ridiculed the attempt to show that Jewish law was more "moral" or "advanced" than other legal systems. Such an apologetic attitude annoyed the revivers because they claimed that it was anachronistic, and therefore "unscientific," and because it was un-Zionist. If Jews were to be a normal nation they should not be

114. "Ve'idat Orkhe," supra n. 49, at 98-99.

115. Eisenstadt, "Medinyut," supra n. 76, at 405; Nehorai, "Ahre," supra n. 28, at 88 (Hellenism); Eisenstadt, "Hevrah," supra n. 12, at 31; Laserson "Ha-Tsorekh ha-Gadol," (The Great Need) in *Bet ha-Sefer*, supra n. 37, at 9, 10; Eisenstadt, "Kodifikatsyah Hadashah shel Mishpatenu ha-Le'umi," (A New Codification of our National Law) in *Tsiyon*, supra n. 12, at 242, 245.

116. Gulak, supra n. 27, at 30; Silberg, "Ha-Mishpat ba-Medinah ha-'Ivrit" (Law in the Hebrew State) in Silberg, supra n. 103, at 180, 198.

117. *Bet ha-Sefer ha-Gavoh le-Mishpat ve-Kalkalah: Sidre Limudim, 1944* (School of Law and Economics: Catalogue 1944), CZA, A212/2, at 4.

118. Eisenstadt, "Medinyut," supra n. 76, at 405; Dickstein, "Sidre ha-Diyun: He'arot la-Takanon shel Mishpat ha-Haverim," (Procedure: Note on the Regulations of the Labor Tribunals) *Davar*, 20 January 1931, reprinted in *Professor Paltiel Dickstein*, supra n. 45, at 44, 46; Grajewsky, "Le-She'elat," supra n. 52, at 206; Dickstein, "Review: Y. Pokrowski," supra n. 34, at 207-8; Dickstein, "Review: S. Ussishkin, Prakim Ba-Mishpat ha-Konstitutsyoni ha-Angli," 3 *Ha-Mishpat Ha-'Ivri* 172, 173 (1927/8).

ashamed to admit that they behaved just as badly as other nations did.¹¹⁹

But the revivers also claimed that Jewish law was better, more moral, more "advanced" than other legal systems,¹²⁰ and that it was a system that was the source of "universal" values. They had to do so. They wanted to convince their Zionist audience that Jewish law was not an archaic system, relevant only for medieval Diaspora Jews, but a system worth reviving in the future Jewish state. They tried to persuade their audience in two ways: by showing that Jewish law promoted progressive social values better than other legal systems, and by attempting to explain away those parts of it that did not fit neatly into this "progressive" image.

The idea that Jewish law embodied universal values enabled the revivers to depict the project of revival as part of the universalist process toward a better future and not as a regression to a particularist past. Jewish law was indeed the "unique and singular law" of the Jews, a "unique and singular nation," but the uniqueness of the Jews was precisely that they were a law-giving nation, a nation whose laws should be followed by the rest of mankind. Like their liberal Jewish predecessors, the revivers, too, succumbed to a version of the "mission of Israel" ideal. They talked about a time when "law shall come out of Zion—the law of universal justice," and dreamed of the day when Hebrew law would replace Roman law as the "universal law of humanity."¹²¹

Specific rules of Jewish law were used as evidence of its progressive tendencies. For example, the rule about the sabbatical year was described as "a fine custom which demonstrates the social-moral tendencies of our *Torah*. An interesting and valuable custom in the history of the development of human thought, which strives to social equality." The traditional rules on fraud "preceded by thousands of years" the development of similar rules in other "civilized nations." The custom created by the Hebrew Courts to award a dismissed employee compensation amounting to a month's salary for every year of work was seen as one example of the general tradition of progressive social justice which always characterized Jewish law.¹²²

119. See Eisenstadt, "Le-Heker," supra n. 45, at 26-27; Dickstein, "Review: Ha-Mishpat," 3 *Ha-Mishpat ha-Ivri* 165, 166, 167 (1928); Rosenbaum, "Ha-Mishpat ha-Ben Le'umi be-Yisra'el Bi-Yeme Kedem," (International Law in Ancient Israel) 1 *Ha-Mishpat Ha-Ivri* 204-5 (1925/6).

120. See e.g., "Ve'idat," supra n. 13, at 235.

121. "Obituary, Shimshon Rosenbaum," 5 *Ha-Mishpat*, issue no. 5, 1, 2 (1935); Grajewsky, "Ha-Memshalah," supra n. 94, at 93; Safra, "Ha-Kinyan ha-Prati ba-Mishpat ha-Ivri" (Private Property in Hebrew Law), 2 *Ha-Mishpat ha-Ivri* 25, 26, 73 (1926/7).

122. "Review: Simcha Assaf, Shmitat Kark'a," 1 *Ha-Mishpat ha-Ivri* 161 (1925/6); Dickstein, "She'elat," supra n. 69, at 150-51; Dickstein, "Mishpat," supra n. 45, at 150.

Another variant of the same activity was to claim that advances in Gentile legal systems specifically, and Gentile culture generally, were due to the influence of Judaism. This was a favorite activity of many Jewish scholars at the time, and the geographical and historical scope of such an endeavor were indeed impressive. Jewish scholars attempted to discover Jewish influences on western and oriental, medieval and modern thought in many corners of the world, and at times they resorted to rather exotic arguments on the way.¹²³

One of the most problematic aspects of Jewish law from this point of view was its attitude to women. Some of the revivers were associated with liberal-feminist organizations in mandatory Palestine, and were actively supporting the Jewish feminist struggle for legal equality.¹²⁴ These revivers therefore spent some energy showing that Jewish law actually treated women as equals,¹²⁵ leading them to adopt contradictory attitudes. When they discussed the conservatism of rabbinical courts in Mandatory Palestine, they criticized them for their refusal to modify archaic Jewish family law, which discriminated against women. When they compared Jewish law to other legal systems, they praised its enlightened attitude to women.¹²⁶

Another problematic aspect of Jewish law was Jewish criminal law. The revivers tried to play down the barbarity of biblical criminal law by comparing it favorably with other, even more barbaric, legal systems. For example, the revivers stressed that unlike medieval European law, Jewish law did not endorse torture as a method of extracting confessions, or that Canon law was crueller than Jewish law.¹²⁷ The revivers tried to show that biblical talionic law was better than the laws of other ancient penal systems because "an eye for an eye," is better than "a death for an eye," or because "an eye for an eye"

123. See e.g., Aptowitz, "Hashpa'at ha-Mishpat ha-Ivri 'al Hitpathut ha-Mishpat ba-Mizrah ha-Notsri," (The Influence of Hebrew Law on the Christian East) in *Sefer Zikaron le-Asher Gulak ve-Shmuel Klein* 223 (Simcha Assaf & Gershom Scholem eds., 1942); Dickstein, "Review: Herman Barats, Ktavim al ha-Yesod ha-Yehudi ba-Sifrut ha-Rusit ha-Atikah," 3 *Ha-Mishpat ha-Ivri* 186 (1927/8) (discussing Jewish influence on ancient Russian law); Issacs, "Influence of Judaism on Western Law," in *Legacy of Israel* 377 (E. Bevan & N. Singer eds., 1927). See also Siew, "John Stuart Mill veha-Kalkalah ha-Medit shel Zmanenu," (John Stuart Mill and the Political Economy of Our Time) *Mishpat ve-Kalkalah* 47, 48 (September 1941).

124. See e.g., Dickstein "Hashra'ah Anglit o Ivrit: Yahaseh Rekhush ben Bene Zug," (English or Hebrew Inspiration: Community Property) in *Professor Paltiel Dickstein*, supra n. 45, at 115; Daykan, *Ha-Matsav ha-Mishpati shel ha-Ishah be-Yisra'el* (The Legal Status of Women in Israel) (1949/50).

125. See e.g., Teplicki, "Dine Mamonot," (Civil Law), *Ha-Mishpat ha-Ivri: Riv'on Mada'i* 77, 79 (1918); Assaf, "Minuy Nashim Le-Epitropsut," (Appointing Women as Guardians) 2 *Ha-Mishpat ha-Ivri* 75 (1925/6).

126. Friedenberg, "Al ha-Rabanut," supra n. 47, at 182; Dickstein, "Ha-Mejelle," supra n. 106, at 193.

127. "Hoda'at ha-Ne'esham ve-Erkah ha-Mishpati," (The Confession of the Accused and its Legal Weight), 1 *Ha-Mishpat* 197 (1927); Ha-Cohen Gutman, "Ir ha-Nidahat ba-Mishpat ha-Kanoni," (The Apostate City in Canon Law), 3 *Ha-Mishpat ha-Ivri* 83 (1927/8).

was only a maximum penalty.¹²⁸ When the revivers compared the laws of Hammurabi to Mosaic laws, they took pains to note that the comparison "emphasizes the moral height of our *Torah*,"¹²⁹ and when their journal, *Ha-Mishpat ha-Ivri*, published an article which compared Hittite laws to Mosaic laws, remarking on the similarity of the two systems, the editors of the journal added a footnote saying that "we want to add that this similar basis serves as a background upon which the unique moral virtues of Mosaic laws gloriously appear."¹³⁰

The most important aspect of the notion of universality, however, was its use in the process of re-orientation of Jewish law. The fact that Jewish law was universal, said the revivers, meant that it did not belong only to the Orient. Jewish law, they argued, existed "on the borderline" between the Orient and the West, and was therefore "destined from its beginning to unify their conflicting influences." Geography was enlisted to support this idea. "Our land," said one of the founders of the Tel Aviv school, "has served and always will serve as the gateway of nations, the connecting link between East and West." The role of the Jewish people was to be "the intermediary between oriental and western cultures."¹³¹

This universalist aspect of revived law was even offered as a solution to the Arab problem, in a variation of the familiar colonial "civilizing mission" theme. True to the contextualist theory of the Historical School, the revivers admitted that it would be unjust to impose Hebrew law on the Palestinian Arabs, but at the same time they argued that the Arabs would adopt it of their own accord. The Arabs, they believed, would "come to seek refuge in our shade, not because of our might, but because of our just laws."¹³²

5.5 Finding the Spirit of the Law

The revivers assumed that Jewish law had a "spirit" which could be discovered. But when they tried to define that spirit, they provided

128. Dickstein, "Hitpathut ha-Mishpat ha-Pili be-Yisra'el ad Tkufat Hatimat ha-Talmud," (The Development of Criminal Law in Israel up to the End of the *Talmudic* Period) 1 *Ha-Mishpat Ha-Ivri* 195 (1925/6); Pomeranz, "Hashkafah Hadasah 'al Huke ha-Onshin shebe-Torat Moshe," (A New View on Mosaic Penal Laws) 3 *Ha-Mishpat* 23 (1928).

129. "Review: Vigdor Aptowitz, Huke Hamurapi," 1 *Ha-Mishpat ha-Ivri* 163 (1925/6).

130. Meyer, "Sefer ha-Hukim ha-Hiti," (The Hittite Code) 1 *Ha-Mishpat ha-Ivri* 75, 86. (1925/6). Fortunately, they did not elaborate, because as a matter of fact, from a modern perspective, Mosaic law was more barbaric than Hittite laws. For example, Hittite laws were less strict on the use of the death penalty for punishing adultery.

131. P. Dickstein, S. Eisenstadt, M. Laserson, S. Rosenbaum, The Establishment of a School of Law and Economics in Tel Aviv: A Memorandum submitted to the Mayor in May 1934 in *School of Law*, supra n. 36, at 7, 9.

132. Yehoshafat, "Shilton," supra n. 113, at 3; Dickstein "Tehiyat Mishpatenu be-Yadenu," (The Revival of Our Law will be Determined by Us) *Ha-Arets* 2 June 1927; "Ve'idat," supra n. 13, at 255.

contradictory descriptions, which had more to do with the current political fashions in Europe and Palestine than with any actual "spirit" of Hebrew law. This was especially evident in their discussion of the question of individualism and collectivism in Jewish law.

Dickstein believed that Jewish law "is suffused" with the principle of individualism. This tendency to "exalt individuality," he said, had to do with the "natural character of the nation . . . merciful, shy, charitable." Another reason for the individualistic bent of Jewish law was found in the fact that Jewish law, unlike other legal systems, was based on the religious principle that every individual was created in the image of God, and thus deserved the same respect that God deserves.¹³³ Eisenstadt, too, argued that Jewish law was individualistic. The spirit of Jewish law, he said, was diametrically opposed to that of Roman law. While Roman law advocated "utility as the supreme principle of the state, and the curtailing of individual freedom for the good of the state," Jewish law stressed "individual freedom."¹³⁴

Finding an "individualistic" spirit in Jewish law proved convenient for those revivers who were keen to distance it from other oriental legal systems. One of the traits of oriental legal systems was said to be the fact that such systems supposedly did not recognize the concepts of personal liberty and individuality. Jewish law, argued some revivers, did not belong to the oriental legal family because, unlike "real" oriental systems, it *did* value personal liberty and individualism.¹³⁵

The claim that Jewish law was individualistic must be understood in the context of late nineteenth century European thought, which tended to view world history as an evolutionary advance from "status" to "contract,"¹³⁶ from a collectivist to an individualistic society (modeled, of course, after nineteenth century European liberal democracies). In the early part of the twentieth century, the belief in the unidirectional evolutionary advance toward a liberal society founded, and the ideal of individualism came under increasing attack.¹³⁷ The revivers were influenced by these attacks and changed their description of Jewish law accordingly.

This influence was manifested in a number of ways. Sometimes the revivers retained the idea that Jewish law was individualistic,

133. Dickstein, "Ha-Mejelle," supra n. 106; Daykan, supra n. 73, 38; Silberg, "Ha-Mishpat ha-Ivri ve-Yahasu la-Po'el," (Hebrew law and its attitude to the Worker) 4 *Ha-Mishpat Ha-Ivri* 229 (1933).

134. Eisenstadt, "Le-Korot," supra n. 59, at 203; Gulak, *Yesode*, supra n. 56, at 7.

135. Yehoshafat, "Shilton," supra n. 113, at 3.

136. See e.g., Maine, *Ancient Law*, supra n. 112.

137. See e.g., Josef Kohler, *Philosophy of Law*, 50-54 (1921); Andrew Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (2d ed. 1914).

but they saw this individualism as a sign of weakness rather than of strength. In 1927, Dickstein, perhaps under the influence of contemporary Italian politics, praised the "political part" of Roman law as "especially valuable for our national revival." He contrasted Jewish political culture, with its "lack of internal discipline and [its] disrespect for all the foundations of political-national organization," with Roman law which was a model of "love of order and discipline," and of "preserving the interests of the collective, the public, even when they contradict the demands of the various individuals, parties and classes of the nation."¹³⁸

Sometimes the revivers questioned the notion that Jewish law was individualistic. Some of them rejected the idea that Jewish law belonged to the individualistic pole of the individualistic-collectivist continuum, preferring instead to place it in the middle of that continuum.¹³⁹ Others were more radical, and completely reversed the position of Jewish and Roman law on that continuum, arguing that whereas Roman law was individualistic, Jewish law was collectivist. For example, in 1926/7, a Soviet scholar compared Roman law, which "invented [the concept of] private property," with Jewish law which limited the scope of private property. Roman law, he said, had conquered the world, but its rule was now beginning to crumble, presumably to be replaced by notions closer to the (quasi-communist) notions that were to be found in Jewish law.¹⁴⁰

The notion that Jewish law was collectivist was used in specific legal contexts. For example, Jewish law was said to accommodate the conception of legal personality better than western law with its "extreme individualism," because in Jewish law, "the first axiom is the collective . . . which is personified by God."¹⁴¹ God, it seems, could lend support both to an individualist and a collectivist version of the "spirit of Jewish law."

138. Dickstein, "Review: Y. Pokrowski," supra n. 34, at 207-8.

139. See e.g. Grajewsky, "Le-She'elat," supra n. 52, at 207 (distinguishing between "Roman law [characterized by] order, might and limitations on individual freedom. European law [characterized by] individualism and liberty of the individual . . . [and] Jewish law [characterized by] Human equity and the rule of justice in society."); Teplicki, "Dine Mamonot," supra n. 47, at 77 (Jewish law does not belong to any of the poles on the individualism-collectivism continuum. Instead it was individualistic in its attitude to personal status, but collectivist in its contract rules.)

140. Safra, "Ha-Kinyan," supra n. 121, at 26, 73 (1926/7). See also Yehoshafat, "Shilton," supra n. 113, at 10-11; Webber, supra n. 21, at 82 (reporting a lecture by Gulak).

141. Eisenstadt, "'Al Hitpathut Musag ha-Ishiyut ha-Mishpatit ba-Mishpat ha-Ivri," (On the Development of the Concept of Legal Personality in Hebrew Law) 1 *Ha-Mishpat* 10, 11 (1927). See also Teplicki, "Dine Mamonot," supra n. 47, at 95 (Jewish law does not recognize the "formal notion" of equality between contracting parties and instead to recognize that an employee has less bargaining power than his employer).

5.6 *Legal Revival and Zionist Activism*

The revivers wanted to make legal revival a respected part of the Zionist program. One method of doing that was by linking legal revival to the Zionist reverence for activism. Zionists imagined Diaspora Jews as passive,¹⁴² in the same way that colonial thought imagined non-European societies as frozen in static traditions.¹⁴³ Zionism offered a new and active way of life. Jews were no longer to wait passively for redemption through godly intervention. Instead, they were to actively reshape their destiny. The revivers used these ideas to argue that Zionists should not wait passively for a reform of the legal system but should initiate it by engaging in the work of legal revival. The revivers also used the notion of activism to enhance the status of the Hebrew courts. The dynamism of the Hebrew Courts, actively working to create Hebrew law, was favorably compared with the passivity of the traditional rabbinical courts, unwilling to adopt a creative attitude to the traditional law.¹⁴⁴

However, notions of activity clashed with the passive tendencies implicit in the legal theories of the Historical School. According to the Historical School, law was formed by an unconscious, organic process, and it was folly to believe that individual human actors could intentionally create (or recreate) a legal system by conscious and directed action.¹⁴⁵ The passive notions of the Historical School also served the revivers as a justification when Hebrew law failed to materialize. "A creation of a law which really reflects the needs of life," they apologized, "takes a long time." Therefore, "the time is still not ripe" for codification.¹⁴⁶

Another way in which the revivers sought to lend Zionist respectability to their project was by pointing to its utility. Socialist Zionism, the dominant ideology in Palestine, sought to turn Jews into productive farmers and workers. Lawyers and legal scholars had no place in this version of Zionist ideology. The revivers, however, argued that lawyers too were "productive," because their knowledge was essential to the process of building the Jewish national home. In this context, the revivers distinguished their efforts from those of western Jewish scholarship. Western Jews studying Jewish culture were only motivated by antiquarian interests, and were thus tainted with the "idleness of the Jewish Exile." By contrast, Hebrew law scholarship was not just academic but a "living theory."¹⁴⁷

142. Zerubavel, supra n. 5, at 27.

143. See e.g., Ranger, supra n. 4, at 247-50.

144. See Eisenstadt, "Le-Korot," supra n. 59, at 194, 201, 202, 208; Cohn, "De'agah shel Yom Etmol," supra n. 42, at 27-28, 33.

145. See e.g., Savigny, supra n. 8, at 27.

146. Dickstein, "Ha-Mejelle," supra n. 106; Epstein-Halevy, supra n. 46, at 127-29.

147. Eisenstadt, "Le-Korot," supra n. 59, at 192. The Hebrew University was seen by the revivers as belonging to this West-European academic tradition, intent on "em-

When the revivers established their law school, they stressed that it would not be merely an academic institution, but was to set "a new and unique trend which is unknown to other learning institutions," for it was meant to play a leading role in Zionist colonization of Palestine. This was both because it would "revive traditional law as far as possible [and] select its principles, direction and spirit so that on these principles we can build our new Hebrew law, according to which our lives in Palestine would be organized,"¹⁴⁸ and because it would assist in the production of knowledge on the Orient, knowledge that would enable the building of the Jewish national home "on rational scientific foundations." For example, the founders of the Tel Aviv school proposed that the school would undertake the task of creating a "colonial criminology"—a special kind of criminology devoted to studying crime in societies which have been undergoing a transition from an "ancient patriarchal" stage to a modern one.¹⁴⁹

One final argument used by the revivers to tie Hebrew law with Zionist interests, was that law was "a unifying force" of the nation. Like their German predecessors, the revivers saw legal revival as "an excellent tool to unify our community, which suffers from so many rifts, based on religious, social, ethnic, economic and political views."¹⁵⁰

6. CONCLUSION

Zionist Jews came to mandatory Palestine to create a new identity for themselves in a borderland between tradition and modernity, East and West. Hebrew law was defined, assembled and sold to the Jewish community in Palestine as the legal system which would best reflect the identities of the new Hebrews of Palestine. However, despite their efforts, the revivers could not totally purge their legal system of marks of the Jewish culture of the Diaspora, and perhaps this was one, though certainly not the only, reason for the failure of the project of legal revival. Hebrew law, unlike the Hebrew language, could not be satisfactorily cleansed of its Exilic and Oriental qualities. It was too entwined with tradition. It reminded Zionists Jews too

balming" Jewish culture instead of "reviving" it. See P. Dickstein, "Al Bet ha-Sefer ha-Gavoh le-Mishpat ve-Kalkalah," (On the School of Law and Economics), undated speech, CZA, A212/32.

148. Tsifroni, "Review," supra n. 47, at 154.

149. Dickstein "Ha-Mosad he-Hadash," (The New Institution) in Bet ha-Sefer ha-Gavoh le-Mishpat ve-Kalkalah, (On the School of Law and Economics), undated speech, CZA, A212/32, at 7; P. Dickstein, S. Eisenstadt, M. Laserson & S. Rosenbaum, "The Establishment of a School of Law and Economics in Tel Aviv: A Memorandum submitted to the Mayor in May 1934," in *School of Law*, supra n. 36, at 9; Mahzor Rishon (First Graduating class) (undated), CZA, A212/32; *Bet ha-Sefer*, supra n. 40, at 28; Eisenstadt, "Ha-Universitah," supra n. 13, at 20.

150. "Ve'idat," supra n. 13, at 234-35.

much of their former, unredeemed selves. They were therefore unwilling to adopt it.

The history of the Hebrew legal revival had been neglected for too long. This is a pity because it is a fascinating phenomenon—the flowering of exotic non-analytic notions of law in the arid legal climate of a tiny British colony.¹⁵¹ Its neglect is also a pity because Hebrew law has much to teach us about the process of cultural production, and the ways in which we invent law to suit our ideologies and identity needs. Most of all, however, the history of Hebrew law is important because it shows us how imperfect our vision of the legal past always is.

151. See e. g., Dickstein, "Ahrayut ha-Sho'el be-Onsin O ha-Yesodot ha-Iratsyonalim ba-Mishpat," (Borrower's Liability in *Vis Major* cases or the Irrational Elements in Law) in *Professor Paltiel Dickstein*, supra n. 45, at 217; Epstein-Halevy, "Mishpat," supra n. 46, at 127 (using Freudian and German Free-Law theories to analyze legal doctrines and institutions). A discussion of the influence of such notions on the Hebrew courts of arbitration is found in Shamir, supra n. 7.

